TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 145.

WILLIAM M. FLEITMANN, SUING ON BEHALF OF HIMSELF AND ALL OTHER STOCKHOLDERS OF THE CONSOLIDATED STREET LIGHTING COMPANY WHO SHALL ELECT TO COME IN AND CONTRIBUTE TO THE EXPENSE OF THE ACTION, APPELLANT,

vs.

THE WELSBACH STREET LIGHTING COMPANY OF AMERICA.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

FILED MAY 9, 1914.

(24,206)

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1 *Bill of Complaint.*

(Filed Dec. 6, 1912.)

United States District Court, Southern District of New York.

In Equity. No. 10—37.

WILLIAM M. FLEITMANN, Suing on Behalf of Himself and All Other Stockholders of The Consolidated Street Lighting Company Who Shall Elect to Come in and Contribute to the Expense of the Action, Plaintiff,

against

UNITED GAS IMPROVEMENT COMPANY, THE UNITED LIGHTING & Heating Company, The Welsbach Street Lighting Company of America, The Consolidated Street Lighting Company, William Findlay Brown, Arthur E. Shaw, Randall Morgan, Samuel T. Bodine, and Thomas Dolan, Defendants.

To the Honorable the Judges of the District Court of the United States in and for the Southern District of New York, in Chancery Sitting:

I. Your orator, William M. Fleitmann, a citizen of the State of New York and a resident and an inhabitant in the City and
2 County of New York, in the Southern District of New York, suing on behalf of himself and all other stockholders of The Consolidated Street Lighting Company who shall elect to come in and contribute to the expense of the action, brings this his bill of complaint against the United Gas Improvement Company, a corporation created and duly organized by and under the Laws of the State of Pennsylvania, and having its principal place of business at Philadelphia, in the State of Pennsylvania, and a citizen of said State; The United Lighting & Heating Company, a corporation created and duly organized by and under the Laws of the State of New Jersey, having its principal place of business at Gloucester City, in the State of New Jersey, and a citizen of the State of New Jersey; The Welsbach Street Lighting Company of America, a corporation created and duly organized by and under the Laws of the State of Illinois, and having its principal place of business at Chicago, in the State of Illinois, and a citizen of the State of Illinois; The Consolidated Street Lighting Company, a corporation created and duly organized by and under the Laws of the State of Maine, and having its principal place of business at Portland, in the State of Maine, and a citizen of that State, and William Findlay Brown, Arthur E. Shaw, Randall Morgan, Samuel T. Bodine and Thomas Dolan each of whom is a resident of the City of Philadelphia and State of Pennsylvania, and a citizen of the State of Pennsylvania.

II. And thereupon your orator complains and says that in the year 1906 the defendant The Consolidated Street Lighting Company

was organized for the purpose of engaging in the business of
3 securing contracts for municipal lighting and of furnishing street lamps and other lighting accessories for the city, municipal and legal authorities throughout the United States. The said The Consolidated Street Lighting Company after its organization began business and entered into business competition in the United States to obtain contracts for municipal lighting, and acquired all or nearly all the issued and outstanding capital stock of the American Street Lamp & Supply Company, a corporation which had been and then was in active competition in said business with the defendants. Among the competitors of The Consolidated Street Lighting Company and of The American Street Lamp & Supply Company were the defendants United Gas Improvement Company, The United Lighting & Heating Company and The Welsbach Street Lighting Company of America, and other companies subsidiary thereto or controlled thereby. The defendant The Consolidated Street Lighting Company after its organization maintained an independent organization not controlled by any outside persons or corporations, and expended large amounts of money in order that it might conduct a large and competitive business through itself and through the said The American Street Lamp & Supply Company.

III. And your orator further shows unto your Honors that the total authorized capital stock of The Consolidated Street Lighting Company was and is $1,000,000, consisting of 10,000 shares of the par value of $100 each.

IV. Your orator further shows unto your Honors that shortly subsequent to the organization of said company and prior to
4 the acts hereinafter complained of the above-named plaintiff became the holder and owner of 1,011 shares of the stock of said defendant The Consolidated Street Lighting Company, and that the plaintiff ever since has been and still is the holder and owner of such shares.

V. Upon information and belief, your orator further shows unto your Honors that in the year 1899 the defendant United Gas Improvement Company caused to be organized the defendant The United Lighting & Heating Company. That all or substantially all of the capital stock of the said The United Lighting & Heating Company was and is owned or controlled by the said United Gas Improvement Company. That the defendant The Welsbach Street Lighting Company of America was organized in the year 1896, and that all or substantially all of the stock of said The Welsbach Street Lighting Company of America was at all the times hereinafter mentioned owned or controlled by said defendants United Gas Improvement Company and The United Lighting & Heating Company.

VI. Upon information and belief, your orator further shows unto your Honors that at all times hereinafter mentioned the defendant Arthur E. Shaw was the president or other executive officer and a director of the defendant The Welsbach Street Lighting Company of America, and was the secretary or other executive officer and a director of the defendant The United Lighting & Heating Company, and was an officer or director or both of various of the controlled or subsidiary companies hereinafter referred to.

5 That the defendants Randall Morgan, Samuel T. Bodine and Thomas Dolan were respectively executive officers of the defendant United Gas Improvement Company, said Morgan being also a director of The United Lighting & Heating Company and constituting the most active and influential members of what was known as the "Committee," which said Committee determined and directed the general operations and policy of said defendant companies and of the controlled or subsidiary companies hereinafter referred to, and that the defendants above named and each of them, together with the defendant William Findlay Brown, were fully cognizant of and actually participated in and directed and authorized the various steps and acts hereinafter complained of.

That the said William Findlay Brown was a director in and officer of the Welsbach Street Lighting Company of America and of The United Lighting & Heating Company.

VII. Upon information and belief, your orator further shows unto your Honors that prior to the year 1906 and ever since, the defendants other than the Consolidated Street Lighting Company, individually and collectively with other persons and companies whose names are unknown to the plaintiff, entered into, maintained and carried out a combination and conspiracy to control throughout the United States the business of securing contracts for municipal lighting and of supplying lamps and other lighting accessories. In pursuance of said general scheme and purpose, said defendants were engaged in secretly and illegally acquiring other companies conducting or about to conduct a similar or competitive business.

6 VIII. And your orator further shows unto your Honors that to carry out said combination and conspiracy and the purposes thereof, and to accomplish the same, the defendants other than the Consolidated Street Lighting Company caused to be organized and acquired various companies engaged in the municipal lighting business and in enterprises connected therewith. The organization and business policy of said newly organized and acquired companies was completely controlled by the said defendants. Said companies were apparently competing with the defendant companies, while in reality and in truth all their acts were done for and on behalf of the defendants other than The Consolidated Street Lighting Company. The purpose of organizing and acquiring said companies was to deceive the public generally and in particular municipal and other legal authorities and those engaged in the municipal lighting business. Said companies interposed bids for lighting contracts and otherwise conducted themselves as independent companies. In reality and in truth the appearance of competition sought to be created thereby was a sham and subterfuge calculated to deceive and was directly managed and controlled by the defendants other than The Consolidated Street Lighting Company.

IX. And your orator, upon information and belief, further shows unto your Honors that the purpose of organizing and conducting said companies was to enable the defendants other than The Consolidated Street Lighting Company, the more effectually to control and monopolize the business of municipal lighting in all parts of the

United States, and the foregoing acts were calculated to effect
7 such purpose and to prevent others from competing with the defendants other than The Consolidated Street Lighting Company by driving them out of business or preventing them from becoming competitive factors in interstate commerce. Among said companies so organized or acquired and conducted by defendants other than The Consolidated Street Lighting Company were the following:

The Pennsylvania Globe Gas Light Company, a Pennsylvania corporation:

The New York & New Jersey Globe Gas Light Company (Ltd.), a New York corporation;

The Globe Light & Heat Company, an Illinois corporation;

The Rising Sun Street Lighting Company, a Maine corporation;

The Sun Vapor & Gas Street Lighting Company, a West Virginia corporation;

The Paterson Street Lighting Company, a corporation;

The American Development Company, a Minnesota corporation;

The Cleveland Street Lighting Company, an Ohio corporation;

The Carbon Light & Power Company, a New Jersey corporation;

The American Lighting Company, a Maryland corporation, and various others.

And, upon information and belief, your orator further shows unto your Honors that more than a majority of the stock of said corporations mentioned or referred to in this paragraph IX was controlled and secretly acquired, and said corporations were controlled by the defendants United Gas Improvement Company, The
8 United Lighting & Heating Company, and The Welsbach Street Lighting Company of America. The facts that said corporations were dummy corporations, or that a majority of their stock was owned and controlled and that they were controlled by the defendant companies other than The Consolidated Street Lighting Company; that the bids made by said companies from time to time for securing municipal lighting contracts were controlled and directed by said defendants; that the entire organization and scheme of said corporations were in accordance with the prearranged designs and plans of said defendants, were kept secret from the public, from the trade and from all the municipal and legal authorities.

X. And your orator further shows unto your Honors that the defendants The Consolidated Street Lighting Company, United Gas Improvement Company, The United Lighting & Heating Company and The Welsbach Street Lighting Company of America, as well as the other corporations mentioned or referred to in paragraph IX above were engaged in interstate commerce in various parts of the United States, in making contracts with municipalities and other legal authorities, and in causing to be transferred from various States of the United States to other States of the United States the mantles, burners and other materials necessary for carrying out and fulfilling such public lighting contracts.

XI. And on information and belief, your orator further shows unto your Honors that shortly after the organization of the defendants

ant The Consolidated Street Lighting Company, the other defendants, realizing that The Consolidated Street Lighting Company would be a strong competitor in the municipal lighting business,
9 individually and collectively and with other persons and companies whose names are unknown to the plaintiff, in pursuance of the general scheme and purpose aforesaid to acquire control of the municipal lighting business, wantonly, wrongfully, maliciously and unlawfully and in violation of the provisions of the Act of Congress approved July 2nd, 1890 (26 Statutes at Large, 209, Chap. 647, U. S. Compiled Statutes 1901, p. 3200), and entitled "An Act to Protect Trade and Commerce against Unlawful Restraints and Monopoly," and with intent to injure the property and business of the defendant The Consolidated Street Lighting Company, by means of acts done which are forbidden and declared to be unlawful by said Act of Congress, combined, conspired, confederated and agreed together to restrain the defendant The Consolidated Street Lighting Company from carrying on the municipal lighting business in the several States of the United States, and wholly to prevent said defendant from engaging in and carrying on said business, and to drive said The Consolidated Street Lighting Company out of business as a competitor, thereby injuring said Company in its property and business, and have so combined, conspired, confederated and agreed together ever since.

XII. And upon information and belief your orator further shows unto your Honors that in pursuance of said combination and conspiracy, and to carry the same into effect, the defendants other than The Consolidated Street Lighting Company did cause offers to be made through the agency of one Wesley S. Block to the persons owning the majority of the stock and in control of The Consolidated Street Lighting Company to furnish a large amount of work-
10 ing capital to said The Consolidated Street Lighting Company, provided that there was sold to him the majority stock and controlling interest in said company. That said Block at the time of said offers stated and represented that he was acting for certain individuals who refused to have their names divulged in the transaction, but that said persons were hostile to the defendants other than The Consolidated Street Lighting Company and were ready and anxious to compete vigorously with such defendants, and that if said unknown persons could obtain control of The Consolidated Street Lighting Company it would enable them to compete vigorously with such defendants and to prevent said defendants from securing a further monopoly of the interstate trade and commerce and the lighting business, and that all necessary capital for such competition would be supplied by the said Block, and his undisclosed principals.

XIII. And on information and belief your orator further shows unto your Honors that relying on said Block's statements described above, and believing them to be true, and induced thereby, the persons owning the majority of the stock and controlling interest in The Consolidated Street Lighting Company, believing that they were furthering the interests of The Consolidated Street Lighting Com-

pany and of all of its stockholders, did transfer their shares of stock in The Consolidated Street Lighting Company to the said Block. The shares of stock so transferred were taken by said Block in his own name and apparently for himself, but in truth and reality said Block was only the agent of the defendants other than The Consolidated Street Lighting Company to acquire said stock with
11 their money, for their use and on their behalf.

XIV. And your orator further shows unto your Honors that at the time of said negotiations defendant The Consolidated Street Lighting Company had successfully commenced its operations in the municipal street lighting business. Valuable contracts had been secured by The American Street Lamp & Supply Company. Bids had been interposed and preparations made for securing many other profitable contracts, both for The Consolidated Street Lighting Company and The American Street Lamp & Supply Company. The success of The Consolidated Street Lighting Company was assured and its prospects were for an increasingly large and profitable business.

XV. And upon information and belief your orator further shows unto your Honors that at the time of or shortly after the transfer of the majority of the stock and controlling interest in The Consolidated Street Lighting Company to said Block, the defendants elected or caused to be elected, said Block to the presidency, and accepted or caused to be accepted, the resignations of the directors of the company, but failed and neglected to elect or cause to be elected, any new directors except dummy directors who were clerks in the office of the attorneys for defendant companies other than The Consolidated Street Lighting Company. At the same time said defendants acquired control of The American Street Lamp & Supply Company, electing or causing to be elected the directors of said company and failing to act or cause to be acted on the resignation of the
12 president of said company for more than a year after the same had been tendered.

XVI. And your orator further shows unto your Honors that from said time defendants, in pursuance of their combination and conspiracy aforesaid, adopted every scheme and used every method in their power to bring about the downfall of The Consolidated Street Lighting Company. On information and belief, acting through the agency of said Block, the defendants other than The Consolidated Street Lighting Company caused the said The American Street Lamp & Supply Company to interpose bids for lighting contracts which said defendants knew would be useless and unsuccessful. That these defendants made or caused to be made by companies other than defendant The Consolidated Street Lighting Company bids which were lower than those which they caused The American Street Lamp & Supply Company to make, rendering it certain that the bids of The American Street Lamp & Supply Company would not be accepted. By thus causing The American Street Lamp & Supply Company to make bids that were inordinately high, defendants caused great loss and damage to the business of The American Street Lamp & Supply Company and The Consolidated Street Lighting Company, losing

for them the opportunity of securing many valuable contracts which they otherwise would have had.

XVII. And, upon information and belief, your orator further shows unto your Honors that in pursuance of their unlawful combination and conspiracy defendants caused the credit of The Consolidated Street Lighting Company to be impaired and injured.

13 The promised working capital was not furnished by said Block or Block's principals for conducting the business of The Consolidated Street Lighting Company. On information and belief, the defendants, other than The Consolidated Street Lighting Company, withheld the money necessary for the regular transaction of the business of The Consolidated Street Lighting Company and The American Street Lamp & Supply Company, preventing salaries from being paid. Overdue accounts were allowed to remain unpaid and obligations for supplies and other materials necessary for the transaction of the business of The Consolidated Street Lighting Company were not met or even attempted to be met, although funds were available with which to make such payments.

XVIII. And, upon information and belief, your orator further shows unto your Honors that the business which The Consolidated Street Lighting Company had secured was also hampered and sought to be destroyed by defendants. Contracts previously obtained by The American Street Lamp & Supply Company were caused to be neglected and unsatisfactorily performed. Defendants caused The Consolidated Street Lighting Company and The American Street Lamp & Supply Company to delay in all of their business undertakings so that punctuality in the performance of their contractual obligations became impossible. Complaints for delays, unsatisfactory work and unpaid obligations became frequent and greatly injured the good name, credit and business prospects of The Consolidated Street Lighting Company. Said defendants, further to effectuate their unlawful projects and to bring about more quickly the

14 ruin of The Consolidated Street Lighting Company, caused the manager of The Consolidated Street Lighting Company to devote himself to minor details of the business and to matters of little importance, thus preventing him, and for the purpose of preventing him, from superintending the performance of existing contracts and from attempting to secure new contracts.

XIX. And your orator further shows unto your Honors that by the above described and other methods the defendants caused the business of The Consolidated Street Lighting Company to lessen and deteriorate steadily, and the stock of The American Street Lamp & Supply Company owned by said The Consolidated Street Lighting Company to become worthless, and in or about the year 1910 caused The Consolidated Street Lighting Company to discontinue its operations and abandon its business, and The American Street Lamp & Supply Company to be dissolved.

XX. And your orator further shows unto your Honors that each and all of the said acts described and referred to were done and performed by the defendants (other than The Consolidated Street Lighting Company) and each of them in pursuance of said combination, conspiracy and agreement and to effectuate the objects and purposes

thereof, and with unlawful intent and purpose as hereinbefore alleged, and that by means of said acquisition and control of said The Consolidated Street Lighting Company and of the acts in connection therewith and subsequent thereto, said defendants have effected and accomplished their plan and purpose in that the business of said The Consolidated Street Lighting Company has been utterly de-
15 stroyed and ruined and the competition thereof has been rendered impossible, and the monopoly which said defendants had conspired to secure has been thereby increased, and that the said The Consolidated Street Lighting Company has been wholly deprived of the large profits which it could and would have secured had it not been prevented and restrained as aforesaid from engaging in competitive business with said defendant companies, and from the use of its property and franchises, trade and commerce between the several States of the United States, and that the stock of the plaintiff in said The Consolidated Street Lighting Company and the stock of all the other stockholders of said company has been rendered absolutely worthless.

XXI. And your orator further shows unto your Honors that this suit is not a collusive one to confer on a Court of the United States jurisdiction of a case of which it would not otherwise have cognizance.

XXII. And your orator further shows unto your Honors that prior to the commencement of this action plaintiff had duly demanded of The Consolidated Street Lighting Company and its officers, to institute proceedings and seek relief similar to that sought herein, but said corporation and officers have refused and neglected to take such action or to institute proceedings. Even if said corporation and its officers did commence action, such action would not be prosecuted with diligence and in good faith, as said corporation and its officers are wholly controlled and directed by the other defendants as hereinabove described.

XXIII. And on information and belief, your orator fur-
16 ther shows unto your Honors that except for the unlawful acts of the defendants other than The Consolidated Street Lighting Company hereinabove alleged, the contracts, property, good will, assets of every kind, nature and description of said The Consolidated Street Lighting Company would prior to the commencement of this suit have become and been worth the sum of $1,000,000, which is the authorized and outstanding capital of said company.

XXIV. And your orator further shows unto your Honors that The Consolidated Street Lighting Company has been injured in its business and property by reason of said combination and conspiracy, and the acts of the defendants done in pursuance thereof and to carry the same into effect which are declared to be unlawful by said Act of Congress to the amount of $1,000,000, to recover threefold which damages under Section 7 of said Act this suit is brought.

XXV. And forasmuch as your orator can have no adequate relief except in this court and to the end that the defendants may, if they can, show why your orator should not have the relief herein prayed for, and each according to his or its best and utmost knowledge, information and belief, but not under oath (answer under oath being

hereby expressly waived), full, true, direct and perfect answer make to all and singular the matters and things stated and charged, and may be decreed to pay over to your orator all damages and losses caused to your orator by the said unlawful acts of said defendants, or either of them, your orator prays:

1. That the defendants may be required to answer the premises.

17 2. That the defendants other than The Consolidated Street Lighting Company may be decreed to pay over to defendant The Consolidated Street Lighting Company the sum of $3,000,000 pursuant to Section 7 of the Act of Congress hereinabove mentioned, and

3. That the defendants other than The Consolidated Street Lighting Company may be compelled to pay the costs of this suit.

May it please your Honors to grant unto your orator a writ of subpœna ad respondendum to issue out of and under the seal of this Honorable Court directed to the said defendants United Gas Improvement Company, The United Lighting & Heating Company, The Welsbach Street Lighting Company of America, The Consolidated Street Lighting Company, William Findlay Brown, Arthur E. Shaw, Randall Morgan, Samuel T. Bodine and Thomas Dolan, commanding them and each of them at a certain time therein to be named and under a certain penalty therein to be limited, to be and appear before this Honorable Court, then and there to answer unto this bill of complaint and to perform and abide by such order and decree in the premises as to this Honorable Court shall seem meet and to be required by the principles of equity and good conscience.

And your orator as in duty bound will ever pray, etc.

HIRSCH, SCHEUERMAN & LIMBURG,
Solicitors for Complainant.

Office & P. O. Address, 160 Broadway, New York, Borough of Manhattan.

HERBERT R. LIMBURG,
Of Counsel.

18 STATE OF NEW YORK,
County of New York, ss:

William M. Fleitmann, being first duly sworn, deposes and says that he is the complainant named in the foregoing bill of complaint; that he has read the said bill and knows the contents thereof and that the same is true of his own knowledge except as to those matters therein stated to be alleged on information and belief, and as to such matters he believes it to be true.

WM. M. FLEITMANN.

Subscribed and sworn to before me this 29th day of November, 1912.

[SEAL.]

ARTHUR H. RYAN,
Notary Public, No. 112, New York County.

19 *Notice of Motion to Dismiss Bill of Complaint as Against the Defendant The Welsbach Street Lighting Company of America.*

(Filed Apr. 4, 1913.)

United States District Court, Southern District of New York.

In Equity.

No. 10-37.

WILLIAM M. FLEITMANN, Suing on Behalf of Himself and All Other Stockholders of The Consolidated Street Lighting Company Who Shall Elect to Come in and Contribute to the Expense of the Action, Plaintiff,

against

UNITED GAS IMPROVEMENT COMPANY, THE UNITED LIGHTING & Heating Company, The Welsbach Street Lighting Company of America, The Consolidated Street Lighting Company, William Findlay Brown, Arthur E. Shaw, Randall Morgan, Samuel T. Bodine, and Thomas Dolan, Defendants.

GENTLEMEN: Take notice that, upon the bill of complaint in this action this Honorable Court will be moved, for and on behalf of the defendant The Welsbach Street Lighting Company of America, at the Federal Court Rooms in the Post Office Building in the Borough of Man-
20 hattan, City of New York, on the 7th day of March, 1913, at the opening of court on that day, or as soon thereafter as counsel can be heard, to dismiss the bill of complaint herein, for points of law appearing upon the face of the bill, to wit: insufficiency of fact to constitute a valid cause of action in equity; that there is no jurisdiction in equity to grant the relief prayed by said bill against this defendant; that compliance has not been made in said bill with the requirements of Rule 27 (formerly Rule 94) of the Equity Rules of this Court, in that the bill fails to set forth with sufficient particularity the efforts of the plaintiff to secure such action as he desires on the part of the managing directors and of the shareholders of Consolidated Street Lighting Company, and the causes of his failure to obtain such action, and for such other or further relief as may be just in the premises, together with the costs of this motion.

Dated, New York City, February 26th, 1913.

Yours, etc.,

HATCH & SHEEHAN,
Solicitors for the Defendant The Welsbach Street Lighting Company of America.

Office and Post Office Address, 14 Wall Street, Borough of Manhattan, New York City.

To Messrs. Hirsch, Scheuerman & Limburg, Solicitors for Complainant.

21 *Opinion.*

(Filed Apr. 4, 1913.)

United States District Court, Southern District of New York.

WILLIAM M. FLEITMANN, Suing on Behalf of Himself and All Other Stockholders of The Consolidated Street Lighting Company Who Shall Elect to Come in and Contribute to the Expense of the Action, Plaintiff,

against

UNITED GAS IMPROVEMENT COMPANY, THE UNITED LIGHTING & Heating Company, The Welsbach Street Lighting Company of America, The Consolidated Street Lighting Company, William Findlay Brown, Arthur E. Shaw, Randall Morgan, Samuel T. Bodine, and Thomas Dolan, Defendants.

COXE, *J.:*

The defendants, The Welsbach Street Lighting Company of America and Arthur E. Shaw, move to dismiss the bill on the following grounds:

First. The bill fails to state a cause of action.

Second. The Court has no jurisdiction to grant the relief prayed for.

22 Third. Failure to comply with Equity Rule No. 27.

The relief prayed for by the complainant is that the defendants, other than The Consolidated Street Lighting Company, may be decreed to pay over to said company the sum of $3,000,000 treble damages under Section 7 of the Anti-Trust Law, and the costs of this action.

The bill alleges that the complainant is a stockholder in the defendant, The Consolidated Company, and, prior to 1906, the defendants, other than said company, entered into a conspiracy to control, throughout the United States, the business of securing contracts for municipal lighting and supplying lamps and other lighting accessories. This conspiracy was it is alleged carried out by organizing other, apparently independent and competing companies, but which were in fact under the control of the defendants other than The Consolidated Company. It is asserted that by means of such dummy corporations, the conspiring defendants endeavored to monopolize interstate commerce in the materials necessary for carrying out public lighting contracts. That these defendants, realizing that the Consolidated Company would be a strong competitor in the business of municipal lighting, agreed and conspired together to prevent the Consolidated Company from carrying on such business in the United States and to drive said company out of business. It is alleged further that, in pursuance of the said conspiracy, the said defendants acquired, through fraud and fraudulent representations, a majority of the stock in said Consolidated Company and placed in control thereof creatures of

their own and adopted every method in their power to wreck and destroy the said Consolidated Company. That they succeeded in accomplishing this result and, in 1910, caused the Consoli-
23 dated Street Lighting Company to discontinue its operations and abandon its business, the result being that the business has been destroyed and the stock is worthless. The bill also alleges that prior to this suit, the plaintiff demanded of the officers of the Consolidated Company that they would bring an action asking relief similar to that now demanded, but they have refused to bring such action. It is alleged that but for the unlawful acts of the defendants, the property, good will and assets prior to the commencement of this suit would have been worth $1,000,000.

The foregoing statement shows sufficiently the intent and purpose of the action.

The question presented by these motions, briefly stated, is whether, when it appears that a number of individuals and corporations have conspired together to wreck a corporation and have succeeded in doing so, a single minority shareholder of such corporation, after the directors and majority shareholders have declined to act, can maintain a suit in equity and recover threefold damages against the conspirators under Section 7 of the Anti-Trust Act?

So far as the seventh section of the Act is concerned, it has been uniformly construed to refer only to an action at law. It permits a person—which word, by the eighth section, includes a corporation—to bring an action at law to recover treble damages. Nowhere in the Act is the right given to an individual to proceed in equity.

Blindell v. Hagan, 54 Fed. Rep., 40; 56 Fed. Rep. 696;
Greer, Mills & Co. v. Stoller, 77 Fed. Rep., 1;
24 Gulf C. & S. F. Ry. Co. v. Miami S. S. Co., 86 Fed. Rep., 407;
National Fire Proofing Company v. Mason Builders' Association et al., 169 Fed. Rep., 259.

In National Fire Proofing Co. v. Mason, cited above, the Circuit Court of Appeals for this circuit said, at p. 263:

"With respect to the Federal statute, it is not obvious in what way a trade agreement between builders and bricklayers, relating to their work in the State of New York, can be said to directly affect interstate commerce; but the consideration of this question is not necessary, because a person injured by a violation of the Federal Act cannot sue for an injunction under it. The injunctive remedy is available to the Government only. An individual can only sue for threefold damages."

These authorities would seem to dispose of these motions. An individual cannot maintain a suit in equity under the Anti-Trust Act. The complainant is an individual, and this is such a suit. An individual can sue only for threefold damages under the Act, and this must be in a suit at law. The complainant here is suing for threefold damages in a suit in equity. The defendants are entitled to have the facts passed on by a jury, but here they are deprived of such

right. In short, the complainant is asking relief under a statute, the provisions of which he has failed to follow.

The Consolidated Company could bring an action at law under the permission implied in Section 8, but where in the law is
25 the right given to a single shareholder to maintain such an action? A law which grants such drastic relief must be strictly construed; the right to maintain an action not mentioned in the law cannot be implied. It will not do to say that the extraordinary remedy here invoked is necessary and should be implied. If such tremendous power is to be given a single shareholder, the appeal should be made to the legislative and not the judicial branch of the Government. It is unnecessary to determine whether a single shareholder can maintain an action at law under the seventh section for the reason that this is not such an action. Other questions have been discussed but I do not deem it essential or wise to extend this decision beyond the precise point involved.

What I decide is that an equity suit cannot be maintained under Section 7 of the Anti-Trust Act by a single stockholder to recover threefold damages for injuries sustained by his corporation.

The motions to dismiss the bill are granted.

April 4, 1913.

26 *Decree.*

At a Stated Term of the United States District Court, Held in the Federal Court Rooms in the Post Office Building, in the Borough of Manhattan, City of New York, for the Southern District of New York, on the 14th Day of April, 1913.

Present: Hon. Alfred C. Coxe, Acting District Judge.

(Filed Apr. 15, 1913.)

In Equity.

No. 10-37.

WILLIAM M. FLEITMANN, Suing on Behalf of Himself and All Other Stockholders of The Consolidated Street Lighting Company Who Shall Elect to Come in and Contribute to the Expense of the Action, Plaintiff,

against

UNITED GAS IMPROVEMENT COMPANY, THE UNITED LIGHTING & Heating Company, The Welsbach Street Lighting Company of America, The Consolidated Street Lighting Company, William Findlay Brown, Arthur E. Shaw, Randall Morgan, Samuel T. Bodine, and Thomas Dolan, Defendants.

This cause came on to be heard at this term upon a motion made by the defendant The Welsbach Street Lighting Company of
27 America to dismiss the bill of complaint for points of law appearing upon the face of the bill, to wit, insufficiency of fact

to constitute a valid cause of action in equity; that there is no jurisdiction in equity to grant the relief prayed by said bill against the defendant; failure to comply with Equity Rule No. 27, and was argued by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged and decreed as follows, viz.: That the motion to dismiss the bill be granted; that plaintiff's bill filed in this case be and is hereby dismissed as to the defendant The Welsbach Street Lighting Company of America, on the ground that an equity suit cannot be maintained under Section 7 of the Anti-Trust Act by a single stockholder to recover threefold damages for injuries sustained by his corporation; that the defendant The Welsbach Street Lighting Company of America be hence dismissed without a day.

ALFRED C. COXE,
U. S. J.

28 *Petition for Appeal and Order Allowing Same.*

(Filed May 17, 1913.)

District Court of the United States, Southern District of New York.

In Equity.

No. 10-37.

WILLIAM M. FLEITMANN, Suing on Behalf of Himself and All Other Stockholders of The Consolidated Street Lighting Company Who Shall Elect to Come in and Contribute to the Expense of the Action, Complainant-Appellant,

against

UNITED GAS IMPROVEMENT COMPANY, THE UNITED LIGHTING & Heating Company, The Welsbach Street Lighting Company of America, The Consolidated Street Lighting Company, William Findlay Brown, Arthur E. Shaw, Randall Morgan, Samuel T. Bodine, and Thomas Dolan, Defendants-Appellees.

Appeal of the Complainant William M. Fleitmann, Suing on Behalf of Himself and All Other Stockholders of The Consolidated Street Lighting Company Who Shall Elect to Come in and Contribute to the Expense of the Action and His Petition for Allowance of said Appeal.

29 To the Honorable Judges of the Circuit Court of Appeals of the United States, Second Circuit, and of the District Court of the United States for the Southern District of New York:

The complainant in the above-entitled cause, William M. Fleitmann, suing on behalf of himself and all other stockholders of The Consolidated Street Lighting Company who shall elect to come in and contribute to the expense of the action, considering that he is aggrieved by the order or decree made herein on the 14th day of

April, 1913, and entered herein on the 15th day of April, 1913, dismissing his suit as against the defendant The Welsbach Street Lighting Company of America, as therein provided, hereby appeals therefrom and from the whole and every part thereof to the United States Circuit Court of Appeals for the Second Circuit, and hereby prays that this appeal may now be allowed and that a citation may be issued accordingly, and that a transcript of the record, papers and proceedings upon which said order or decree was made, duly authenticated, may be sent to the said Circuit Court of Appeals, and that said order or decree may be reversed with costs, and for such other or further relief as may be meet and just.

And so the complainant will ever pray, etc.

HIRSCH, SCHEUERMAN & LIMBURG,
Solicitors for Complainant-Appellant.

160 Broadway, Borough of Manhattan, City of New York.

And now, to wit, on the 16th day of May, 1913, it is ordered that the above appeal be allowed as prayed for.

GEO. C. HOLT, *D. J.*

30 *Assignment of Errors.*

(Filed May 16, 1913.)

District Court of the United States, Southern District of New York.

In Equity.

No. 10-37.

Assignment of Errors.

WILLIAM M. FLEITMANN, Suing on Behalf of Himself and All Other Stockholders of The Consolidated Street Lighting Company Who Shall Elect to Come in and Contribute to the Expense of the Action, Complainant-Appellant,

against

UNITED GAS IMPROVEMENT COMPANY, THE UNITED LIGHTING & Heating Company, The Welsbach Street Lighting Company of America, The Consolidated Street Lighting Company, William Findlay Brown, Arthur E. Shaw, Randall Morgan, Samuel T. Bodine, and Thomas Dolan, Defendants-Appellees.

Now comes the complainant, William M. Fleitmann, above named, suing on behalf of himself and all other stockholders of The Consolidated Street Lighting Company who shall elect to come in and contribute to the expense of the action, by his solicitors, and presents the accompanying petition for appeal from the decree herein dated the 14th day of April, 1913, and entered on the 15th day of April,

1913, for the following assignments of error and submits that
31 the District Court of the United States for the Southern District of New York and the Honorable Judge thereof who made said decree, in dismissing this suit by said decree as against the defendant The Welsbach Street Lighting Company of America, erred in the following particulars, to wit:

First. In that the Court found and held that an equity suit cannot be maintained by a single stockholder of a corporation under the provisions of Section 7 of the Act of Congress approved July 2, 1890 (26 Statutes at Large, 209, Chap. 647, U. S. Compiled Statutes 1901, p. 3200) to recover three fold damages for injuries sustained by the corporation.

Second. In that the Court found and held that an equity suit cannot be maintained under the provisions of Section 7 of the Act of Congress approved July 2, 1890 (26 Statutes at Large, 209, Chap 647, U. S. Compiled Statutes 1901, p. 3200), by a single stockholder suing on behalf of himself and all other stockholders of a corporation similarly situated who shall elect to come in and contribute to the expense of the action to recover three-fold damages on behalf of the corporation for injuries sustained by the corporation.

Third. In that the Court found and held that the bill of complaint herein does not set forth a good cause of action in equity.

Fourth. In that the Court found and held that the plaintiff's bill filed in this case be dismissed as to the defendant The Welsbach Street Lighting Company of America.

Wherefore, the complainant prays that the said decree may be reversed and that the said District Court of the United States
32 be directed by the mandate of the United States Circuit Court of Appeals for the Second Circuit to enter an order and decree vacating and reversing the said decree herein with costs to complainant, and complainant further prays for such other or further relief as shall seem just in the premises.

Dated, New York, May 16th, 1913.

HIRSCH, SCHEUERMAN & LIMBURG,
Solicitors for Complainant.

160 Broadway, Manhattan, New York City.

Memorandum as to Filing of Bond.

An appeal bond in the sum of $250 was approved by Judge Holt on the 16th day of May, 1913, and was filed in the office of the Clerk of the District Court of the United States for the Southern District of New York on the 17th day of May, 1913.

33 *Citation.*

By the Honorable, One of the Judges of the District Court of the United States for the Southern District of New York, in the Second Circuit.

To The Welsbach Street Lighting Company of America, Greeting:

You are hereby cited and admonished to be and appear before a United States Circuit Court of Appeals for the Second Circuit, to be holden at the Borough of Manhattan, in the City of New York, in the District and Circuit above named, on the 14th day of June, 1913, pursuant to an appeal filed in the Clerk's office of the District Court of the United States for the Southern District of New York, wherein William M. Fleitmann, suing on behalf of himself and all other stockholders of The Consolidated Street Lighting Company who shall elect to come in and contribute to the expense of the action, is appellant and you are appellee to show cause, if any there be, why the decree in said appeal mentioned should not be corrected and speedy justice should not be done in that behalf.

Given under my hand at the Borough of Manhattan, in the City of New York, in the District and Circuit above named, this 16th day of May, in the year of our Lord One Thousand Nine Hundred and Thirteen, and of the Independence of the United States the One Hundred and Thirty-seventh.

GEO. C. HOLT,
Judge of the District Court of the United States for the Southern District of New York, in the Second Circuit.

(Endorsed: Filed May 20, 1913. Service of a copy of the within is hereby admitted. Dated N. Y., May 19, 1913. Hatch & Sheehan, Att'ys for appellee The Welsbach Street Lighting Company of America.)

34 *Order Approving Præcipe.*

(Filed June 5, 1913.)

United States District Court, Southern District of New York.

In Equity.

No. 10-37.

WILLIAM M. FLEITMANN, Suing on Behalf of Himself and All Other Stockholders of The Consolidated Street Lighting Company Who Shall Elect to Come in and Contribute to the Expense of the Action, Plaintiff,

vs.

UNITED GAS IMPROVEMENT COMPANY, THE UNITED LIGHTING & Heating Company, The Welsbach Street Lighting Company of America, The Consolidated Street Lighting Company, William Findlay Brown, Arthur E. Shaw, Randall Morgan, Samuel T. Bodine, and Thomas Dolan, Defendants.

Upon reading the annexed præcipe and stipulation dated June 5, 1913, by and between the solicitors for the complainant and defendant The Welsbach Street Lighting Company of America in the above-entitled case, it is

Ordered that the Clerk prepare and certify the transcript of record on the appeal taken by the complainant from the decree dated April 14, 1913, dismissing the bill of complaint as against defendant The Welsbach Street Lighting Company of America, in accordance with said stipulation and præcipe.

Dated, June 5, 1913.

ALFRED C. COXE,
Acting U. S. D. J.

35 *Stipulation.*

United States District Court, Southern District of New York.

In Equity.

No. 10-37.

WILLIAM M. FLEITMANN, Suing on Behalf of Himself and All Other Stockholders of The Consolidated Street Lighting Company Who Shall Elect to Come in and Contribute to the Expense of the Action, Plaintiff,

vs.

UNITED GAS IMPROVEMENT COMPANY, THE UNITED LIGHTING & Heating Company, The Welsbach Street Lighting Company of America, The Consolidated Street Lighting Company, William Findlay Brown, Arthur E. Shaw, Randall Morgan, Samuel T. Bodine, and Thomas Dolan, Defendants.

It is hereby stipulated that the Clerk of the District Court of the United States for the Southern District of New York may certify

the transcript of record on appeal in accordance with the præcipe hereto annexed.

Dated, June 5th, 1913.

HIRSCH, SCHEUERMAN & LIMBURG,
Solicitors for Plaintiff-Appellant.

HATCH & SHEEHAN,
Solicitors for Defendant-Appellee The Welsbach Street Lighting Company of America.

36 *Præcipe.*

United States District Court, Southern District of New York.

WILLIAM M. FLEITMANN, Suing on Behalf of Himself and All Other Stockholders of The Consolidated Street Lighting Company Who Shall Elect to Come in and Contribute to the Expense of the Action, Plaintiff,

vs.

UNITED GAS IMPROVEMENT COMPANY, THE UNITED LIGHTING & Heating Company, The Welsbach Street Lighting Company of America, The Consolidated Street Lighting Company, William Findlay Brown, Arthur E. Shaw, Randall Morgan, Samuel T. Bodine, and Thomas Dolan, Defendants.

Præcipe.

To the Clerk:

You are hereby requested to certify the transcript of record to be filed in the United States Circuit Court of Appeals for the Second Circuit pursuant to an appeal allowed in the above-entitled case on the 16th day of May, 1913, and to include therein the following and no other papers, viz:

37 Bill of complaint.

Notice of motion to dismiss bill of complaint as against the defendant The Welsbach Street Lighting Company of America.

Opinion of District Court.

Decree.

Petition for appeal and order allowing same.

Assignment of errors.

Memorandum as to filing of bond.

Citation.

Præcipe.

Stipulation and order approving præcipe.

Stipulation re certification.

Clerk's certificate.

Yours, etc.,

HIRSCH, SCHEUERMAN & LIMBURG,
Solicitors for Complainant.

160 Broadway, Manhattan, New York City.

38 *Stipulation Re Certification.*

It is hereby stipulated that the foregoing printed copy is a true transcript of the record in the above-entitled case and the whole thereof now on file in the office of the Clerk of the District Court of the United States for the Southern District of New York, and that said clerk may so certify the same.

Dated, New York, June 12th, 1913.

HIRSCH, SCHEUERMAN & LIMBURG,
Solicitors for Plaintiff-Appellant.

HATCH & SHEEHAN,
Solicitors for Defendant-Appellee The Welsbach Street Lighting Company of America.

39 *Clerk's Certificate.*

UNITED STATES OF AMERICA,
Southern District of New York, ss:

In Equity.

No. 10-37.

WILLIAM M. FLEITMANN, Suing on Behalf of Himself and All Other Stockholders of The Consolidated Street Lighting Company Who Shall Elect to Come in and Contribute to the Expense of the Action, Plaintiff,

vs.

UNITED GAS IMPROVEMENT COMPANY, THE UNITED LIGHTING & Heating Company, The Welsbach Street Lighting Company of America, The Consolidated Street Lighting Company, William Findlay Brown, Arthur E. Shaw, Randall Morgan, Samuel T. Bodine, and Thomas Dolan, Defendants.

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States of America for the Southern District of New York, do hereby certify that the foregoing is a correct transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern
40 District of New York, this 13th day of June in the year of our Lord one thousand nine hundred and thirteen, and of the Independence of the said United States the one hundred and thirty-seventh.

[SEAL.] ALEX. GILCHRIST, JR., *Clerk.*

41 United States Circuit Court of Appeals for the Second Circuit, October Term, 1913.

Nos. 92—93.

Argued December 9, 1913. Decided January 13, 1914.

WILLIAM M. FLEITMANN, Complainant-Appellant,
vs.
THE UNITED GAS IMPROVEMENT COMPANY et al., Defendants-Appellees.
(SHAW.)

SAME
vs.
SAME.
(WELSBACH.)

Appeal from the District Court of the United States for the Southern District of New York.

Before Lacombe, Ward, and Rogers, Circuit Judges.

These causes come here upon appeals from decrees dismissing the bills upon motion. Complainant brought suits in equity on his own behalf and on behalf of all other stockholders of the Consolidated Street Lighting Company, not to recover personal damages or a personal judgment, but to compel defendant- to pay to the Consolidated Company the amount for which defendants would be liable at law in a direct action by that corporation, because of viola-
42 tions of the Sherman Anti-Trust Act, whereby the Consolidated Company, of which complainant is a minority stockholder has, it is alleged been driven out of business.

Per Curiam:

The opinion of Judge Coxe, sitting in the District Court, which sufficiently sets forth the allegations of the bills and in which we concur, will be found in — F. R., —.

We are clearly of the opinion that an action to recover treble damages under section 7 of the Act must be an action at law, where defendants have the constitutional right to a jury trial.

The sole relief prayed in these bills is that the defendants other than the Consolidated Company, be decreed to pay over to the Consolidated Company treble the damages it has sustained by some violation of the Sherman Act. We find no authority which gives to a court of equity the jurisdiction to make such a decree. There is no prayer for relief which would warrant such a construction of the bill as would merely require the Consolidated Company to sue the other defendants for treble damages under the Statute.

We think the dismissal was proper and affirm the decrees with costs.

H. L. Scheuerman, for the Appellant.
E. W. Hatch, for the Appellees.

43 At a Stated Term of the United States Circuit Court of Appeals in and for the Second Circuit, Held at the Court Rooms, in the Post Office Building, in the City of New York, on the 23rd Day of January, One Thousand Nine Hundred and Fourteen.

Present:

Hon. E. Henry Lacombe,
Hon. Henry G. Ward,
Hon. Henry Wade Rogers,
Circuit Judges.

WILLIAM M. FLEITMANN, Complainant-Appellant,
vs.
UNITED GAS IMPROVEMENT COMPANY et al., Defendants-Appellees.
(WELSBACH.)

Appeal from the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the decree of said District Court be and it hereby is affirmed with costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

E. H. L.
H. W. R.

44 Endorsed: United States Circuit Court of Appeals, Second Circuit. W. M. Fleitmann vs. United Gas, etc., Co. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed Jan. 27, 1914. William Parkin, Clerk.

45 United States Circuit Court of Appeals for the Second Circuit.

WILLIAM M. FLEITMANN, Suing on Behalf of Himself and All Other Stockholders of The Consolidated Street Lighting Company Who Shall Elect to Come in and Contribute to the Expense of the Action, Plaintiff-Appellant,

against

UNITED GAS IMPROVEMENT COMPANY, THE UNITED LIGHTING & Heating Company, The Welsbach Street Lighting Company of America, The Consolidated Street Lighting Company, William Findlay Brown, Arthur E. Shaw, Randall Morgan, Samuel T. Bodine, and Thomas Dolan, Defendants-Respondents.

Appeal of the Complainant, William M. Fleitmann, Suing on Behalf of Himself and All Other Stockholders of the Consolidated Street Lighting Company Who Shall Elect to Come in and Contribute to the Expense of the Action and His Petition for Allowance of the said Appeal to the Honorable Judges of the Supreme Court of the United States and of the Circuit Court of Appeals of the United States, Second Circuit.

The complainant in the above entitled cause, William M. Fleitmann, suing on behalf of himself and all other stockholders of The Consolidated Street Light- Company who shall elect to come in and contribute to the expense of the action, considering that he is aggrieved by the order of the United States Circuit Court of Appeals for the Second Circuit in this cause, bearing date the 27th day of January, 1914, affirming the decree of the District Court of the United States for the Southern District of New York entered
46 in the office of the Clerk of said Court on the 15th day of April, 1913, dismissing the bill herein as to the defendant The Welsbach Street Lighting Company of America, hereby appeals from said order and from the whole and every part thereof to the Supreme Court of the United States and hereby prays that this appeal may now be allowed and that a citation may be issued accordingly and that a transcript of the record, papers and proceedings upon which said order was made, duly authenticated, may be sent to the Supreme Court of the United States and that said order may be reversed with costs, and for such other and further relief as may be meet and just.

And so the complainant will ever pray, etc.

HIRSCH, SCHEUERMAN & LIMBURG,
Solicitors for Plaintiff-Appellant, 160 Broadway, Manhattan, New York City.

And now, to-wit, on the 27th day of April, 1914, it is
Ordered that the above appeal be allowed as prayed for.

H. G. WARD, *C. J.*

47 (Endorsed:) U. S. Circuit Court of Appeals for the Second Circuit. William M. Fleitmann, Suing on Behalf of Himself, &c., Plaintiff-Appellant, against United Gas Improvement Co. et al., Defendants-Respondents (Welsbach S. L. Co.). Assignment of Errors. Hirsch, Scheuerman & Limburg, Attorneys for Appellant, 160 Broadway, Borough of Manhattan, New York City, N. Y. Copy this day received. Apr. 30, 1914. Hatch & Sheehan, Att'ys for Def't-Resp'd't Welsbach Street Lighting Company of America. United States Circuit Court of Appeals, Second Circuit. Filed May 1, 1914. William Parkin, Clerk.

48 United States Circuit Court of Appeals for the Second Circuit.

WILLIAM M. FLEITMANN, Suing on Behalf of Himself and All Other Stockholders of The Consolidated Street Lighting Company Who Shall Elect to Come in and Contribute to the Expense of the Action, Plaintiff-Appellant,

against

UNITED GAS IMPROVEMENT COMPANY, THE UNITED LIGHTING & Heating Company, The Welsbach Street Lighting Company of America, The Consolidated Street Lighting Company, William Findlay Brown, Arthur E. Shaw, Randall Morgan, Samuel T. Bodine, and Thomas Dolan, Defendants-Respondents.

Assignment of Errors.

Now comes the complainant William M. Fleitmann above named, suing on behalf of himself and all other stockholders of The Consolidated Street Lighting Company who shall elect to come in and contribute to the expense of the action, by his solicitors, and presents the accompanying petition for appeal from the order herein dated the 27th day of January, 1914, and files the following assignments of error, and submits that the United States Circuit Court of Appeals for the Second Circuit and the Honorable Judges thereof who made said order affirming the decree of the District Court of the United States for the Southern District of New York dismissing this suit as against the defendant The Welsbach Street Lighting Company of America, erred in the following particulars, to-wit:

49 First. In that the United States Circuit Court of Appeals for the Second Circuit and the District Court of the United States for the Southern District of New York found and held that a suit in equity, by a minority shareholder of a corporation (the Consolidated Street Lighting Company) who is suing on behalf of himself and all other shareholders of that corporation who shall elect to come in and contribute to the expense of the action, charging defendants (other than said corporation) with acts in violation of the provisions of Section 7 of the Act of Congress approved July 2nd, 1890 (26 Statutes at Large 209, Chap. 647, U. S. Compiled Statutes 1901, p. 3200) which resulted in injury and damage to said corporation and that the said corporation had refused to begin an

action to recover for such damages under said statute in its own behalf after demand therefor had been duly made by said shareholder, will not lie to secure a judgment decreeing that such defendants (other than the said corporaation) shall pay over to the said corporation damages for such violations and injury.

Second. In that the United States Circuit Court of Appeals for the Second Circuit and the District Court of the United States for the Southern District of New York found and held that a suit in equity, by a minority shareholder of a corporation (the Consolidated Street Lighting Company) who is suing on behalf of himself and all other shareholders of that corporation who shall elect to come in and contribute to the expense of the action, charging defendants (other than said corporation) with acts in violation of the provisions of Section 7 of the Act of Congress approved July
50 2nd, 1890 (26 Statutes at Large 209, Chap. 647, U. S. Compiled Statutes 1901, p. 3200) which resulted in injury and damage to said corporation and that the said corporation had refused to begin an action to recover for such damages under said statute in its own behalf after demand therefor had been duly made by said shareholder, will not lie to secure a judgment decreeing that such defendants (other than said corporation) shall pay over to the said corporation three fold damages for such violations and injury.

Third. In that the United States Circuit Court of Appeals for the Second Circuit and the District Court of the United States for the Southern District of New York found and held that a suit in equity, by a minority shareholder of a corporation (the Consolidated Street Lighting Company) who is suing on behalf of himself and all other shareholders of that corporation who shall elect to come in and contribute to the expense of the action, charging defendants (other than said corporation) with acts in violation of the provisions of Section 7 of the Act of Congress approved July 2nd, 1890 (26 Statutes at Large 209, Chap. 647, U. S. Compiled Statutes 1901, p. 3200) which resulted in injury and damage to said corporation and that the said corporation had refused to begin an action to recover for such damages under said statute in its own behalf after demand therefor had been duly made by said shareholder, will not lie to secure a judgment decreeing that said corporation shall institute an action at law against the defendants (other than the said corporation) to recover damages for such violations and injury.

51 Fourth. In that the United States Circuit Court of Appeals for the Second Circuit and the District Court of the United States for the Southern District of New York found and held in a suit brought by a minority shareholder of a corporation (the Consolidated Street Lighting Company) suing on behalf of himself and all other shareholders of that corporation who shall elect to come in and contribute to the expense of the action, charging defendants (other than said corporation) with acts in violation of the provisions of Section 7 of the Act of Congress approved July 2nd, 1890 (26 Statutes at Large 209, Chap. 647, U. S. Compiled

Statutes 1901, p. 3200) which resulted in injury and damage to said corporation and after the said corporation had refused to begin an action to recover for such damages under said statute in its own behalf after demand therefor had been made by the complainant, that the bill of complaint did not warrant such a construction as would permit the court to decree that the corporation shall sue the defendants (other than said corporation) for compensatory or treble damages under said statute for such violations and injury.

Fifth. In that the United States Circuit Court of Appeals for the Second Circuit and the District Court of the United States for the Southern District of New York found and held that an equity suit cannot be maintained by a single stockholder of a corporation under the provisions of Section 7 of the Act of Congress approved July 2nd, 1890 (26 Statutes at Large 209, Chap. 647 U. S. Compiled Statutes 1901, p. 3200) to recover three-fold damages for injuries sustained by the corporation.

52 Sixth. In that the United States Circuit Court of Appeals for the Second Circuit and the District Court of the United States for the Southern District of New York found and held that an equity suit cannot be maintained under the provisions of Section 7 of the Act of Congress approved July 2nd, 1890 (26 Statutes at Large 209, Chap. 647 U. S. Compiled Statutes of 1901, p. 3200) by a single stockholder suing on behalf of himself and all other stockholders of a corporation similarly situated who shall elect to come in and contribute to the expense of the action to recover three-fold damages on behalf of the corporation for injuries sustained by the corporation.

Seventh. In that the United States Circuit Court of Appeals for the Second Circuit and the District Court of the United States for the Southern District of New York found and held that the bill of complaint herein does not set forth a good cause of action in equity.

Eighth. In that the United States Circuit Court of Appeals for the Second Circuit and the District Court of the United States for the Southern District of New York found and held that the plaintiff's bill filed in this case be dismissed as to the defendant The Welsbach Street Lighting Company of America.

Ninth. In that the United States Circuit Court of Appeals for the Second Circuit affirmed the decree of the United States District Court for the Southern District of New York entered in the office of the Clerk of said Court on the 14th day of April, 1913, granting the motion of the defendant The Welsbach Street Lighting Company of America to dismiss the bill of complaint and dismissing the same as against said defendant.

53 Tenth. In that the United States Circuit Court of Appeals for the Second Circuit ordered that the said decree of the United States District Court for the Southern District of New York be affirmed with costs.

Wherefore the complainant prays that the said order may be reversed and that the said United States Circuit Court of Appeals for the Second Circuit and the District Court of the United States

for the Southern District of New York be directed by the mandate of the United States Supreme Court to enter an order and decree vacating and reversing the said order and decree heretofore rendered herein with costs to complainant, and complainant further prays for such other or further relief as shall seem just in the premises.

Dated New York, April 27, 1914.

HIRSCH, SCHEUERMAN & LIMBURG,
Solicitors for Complainant.

160 Broadway, Manhattan, New York City, N. Y.

Endorsed: U. S. Circuit Court of Appeals for the Second Circuit. William M. Fleitmann suing on behalf of himself, etc., Plaintiff-Appellant, against United Gas Improvement Co. et al. Assignment of Errors. Hirsch, Scheuerman & Limburg, Attorneys for Appellant, 160 Broadway, Borough of Manhattan, New York City, N. Y. Copy this day received. Apr. 30, 1914. Hatch & Sheehan, Att'ys for def'ts resp'd't The Welsbach Street Lighting Company of America. United States Circuit Court of Appeals, Second Circuit. Filed May 1, 1914. William Parkin, Clerk.

54 Know all men by these presents, that the United States Fidelity and Guaranty Company having an office and usual place of business at No. 47 Cedar Street, Borough of Manhattan, City, County and State of New York, is held and firmly bound unto The Welsbach Street Lighting Company of America in the full and just sum of Five Hundred ($500.00) Dollars, to be paid to the said The Welsbach Street Lighting Company of America, its certain attorney, successors and assigns, to which payment, well and truly to be made, it binds itself, its successors and assigns, firmly by these presents.

Sealed with its seal and dated the 24th day of April, 1914.

Whereas, lately at a term of the United States Circuit Court of Appeals for the Second Circuit, in a suit depending in said Court between William M. Fleitmann, suing on behalf of himself and all other stockholders of The Consolidated Street Lighting Company who shall elect to come in and contribute to the expense of the action, plaintiff-appellant, and United Gas Improvement Company, The United Lighting & Heating Company, The Welsbach Street Lighting Company of America, The Consolidated Street Lighting Company, William Findlay Brown, Arthur E. Shaw, Randall Morgan, Samuel T. Bodine and Thomas Dolan, defendants-respondents, an order was entered bearing date the 27th day of January, 1914, affirming the decree of the District Court of the United States for the Southern District of New York entered in the office of the Clerk of said Court on the 15th day of April, 1913, dismissing the bill in said action as to the defendant The Welsbach Street Lighting Company of America, and the said William M. Fleitmann, suing on behalf of himself and all other stockholders of The Consolidated Street Lighting Company, etc., having obtained an order allowing an appeal from said order and having filed a copy thereof in the Clerk's Office of the said

Court to reverse the order in the aforesaid suit, and a citation directed to the said The Welsbach Street Lighting Company of
55 America, and others, citing and admonishing them to be and appear at the Supreme Court of the United States, at Washington, within — days from the date thereof.

Now, therefore, the condition of the above obligation is such that if the said William M. Fleitmann, suing on behalf of himself and all other stockholders of The Consolidated Street Lighting Company, etc., shall prosecute his appeal to effect, and answer all damages and costs if he fails to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

Sealed and Delivered in Presence of:—

UNITED STATES FIDELITY & GUARANTY CO.,

[SEAL.] By S. FRANK HEDGES, [L. S.]
Attorney in Fact.

Attest:

WILLIAM H. ESTWICK, [L. S.]
Attorney in Fact.

56 *Affidavit, Acknowledgement and Justification by the United States Fidelity and Guaranty Company.*

[Vignette.]

STATE OF NEW YORK,
County of New York, ss:

Before me personally came S. Frank Hedges known to me to be Attorney in Fact of the United States Fidelity and Guaranty Company, the corporation described in and which executed the annexed bond of The Welsbach Street Lighting Company of America as surety thereon, who being by me duly sworn, deposes and says that he resides in the City of New York, State of New York, and that he is the Attorney in Fact of the said United States Fidelity and Guaranty Company, and knows the corporate seal thereof; that said Company is duly and legally incorporated under the laws of the State of Maryland; that said Company has complied with the provisions of the Act of Congress of August 13, 1894, allowing certain corporations to be accepted as surety on bonds; that the seal affixed to the annexed bond of The Welsbach Street Lighting Company of America, is the corporate seal of the said United States Fidelity and Guaranty Company, and was thereto affixed by order and authority of the Board of Directors of said Company; and that he signed his name thereto by like order and authority as Attorney in Fact of said Company; and that he is acquainted with William H. Estwick and knows him to be Attorney-in-fact of said Company; and that the signature of said William H. Estwick subscribed to said bond is the genuine handwriting of said William H. Estwick and was thereto subscribed by order and authority of said Board of Directors, and in the presence of said deponent; and that the assets of said Company, unencumbered and liable to execution, exceed its claims, debts and liabili-

ties, of every nature whatsoever, by more than the sum of two million dollars ($2,000,000.00).

S. FRANK HEDGES.

Sworn to, acknowledged before me, and subscribed in my presence this 24 day of Apr. 1914.

ALBERT J. ROWLAND,
Notary Public, New York County, No. 3318; Registers No. 6115; Certificates Filed in Kings Registers No. 6060, Bronx No. 10, Registers No. 632, Queens, Richmond, Westchester, Nassau, Putnam, Orange, and Suffolk Counties.

Term Expires Mar. 30, 1916.

57 [Endorsed:] County Clerk's File No. —. United States Circuit Court of Appeals for the Second Circuit. William M. Fleitmann, suing on behalf of himself and all other stockholders of The Consolidated Street Lighting Company, etc., Plaintiff-appellant, against United Gas Improvement Company, The United Lighting & Heating Company, The Welsbach Street Lighting Company of America, et al., Defendants-respondents. Undertaking on Appeal. (Welsbach S. L. Co. Appeal.) Copy this day received Apr. 30, 1914. Hatch & Sheehan, Att'ys for Def't-Resp'd't The Welsbach Street Lighting Company of America. The within undertaking is approved as to form and as to the sufficiency of the surety. H. G. Ward, U. S. J. United States Fidelity and Guaranty Co., 47 Cedar Street, New York City. Surety. United States Circuit Court of Appeals, Second Circuit. Filed May 1, 1914. William Parkin, Clerk.

58 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby Certify that the foregoing pages, numbered from 1 to 57 inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of William M. Fleitmann against United Gas Improvement Company et al. (Welsbach Appeal) as the same remain of record and on file in my office.

In Testimony Whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 4th day of May in the year of our Lord One Thousand Nine Hundred and fourteen and of the Independence of the said United States the One Hundred and thirty-eighth.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN, *Clerk.*

59 By the Honorable one of the Judges of the United States Circuit Court of Appeals for the Second Circuit to the Welsbach Street Lighting Company of America, Greeting:

You are hereby cited and admonished to be and appear before a Supreme Court of the United States at Washington, in the District of Columbia, on the 23rd day of May, 1914, pursuant to an appeal filed in the Clerk's office of the United States Circuit Court of Appeals for the Second Circuit, wherein William M. Fleitmann, suing on behalf of himself and all other stockholders of the Consolidated Street Lighting Company who shall elect to come in and contribute to the expense of the action is appellant and you are appellee, to show cause, if any there be, why the decree in said appeal mentioned should not be corrected and speedy justice should not be done in that behalf.

Given under my hand at the Borough of Manhattan, in the City of New York, in the Circuit above mentioned, this 27th day of April, in the year of our Lord one thousand nine hundred and fourteen and of the independence of the United States the one hundred and thirty-eighth.

H. G. WARD,
Judge of the United States Circuit Court of Appeals for the Second Circuit.

60 [Endorsed:] United States Circuit Court of Appeals, Second Circuit. William M. Fleitmann, plaintiff-appellant, vs. United Gas Improvement Company et al., defendants-respondents. (Welsbach S. L. Co. appeal.) Original citation. Hirsch, Scheuerman & Limburg, attorneys for appellant, 160 Broadway, Borough of Manhattan, New York City, N. Y. Service of a copy of the within is hereby admitted. Dated Apr. 30, 1914. —— ——, att'ys for for def't-resp'd't Welsbach Street Lighting Company of America. Copy this day received, Apr. 30, 1914. Hatch & Sheehan. Filed May 1, 1914. William Parkin, clerk United States Circuit Court of Appeals, Second Circuit.

Endorsed on cover: File No. 24,206. U. S. Circuit Court Appeals, 2nd Circuit. Term No. 145. William M. Fleitmann, suing on behalf of himself and all other stockholders of The Consolidated Street Lighting Company who shall elect to come in and contribute to the expense of the action, appellant, vs. The Welsbach Street Lighting Company of America. Filed May 9th, 1914. File No. 24,206.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 146.

WILLIAM M. FLEITMANN, SUING ON BEHALF OF HIMSELF AND ALL OTHER STOCKHOLDERS OF THE CONSOLIDATED STREET LIGHTING COMPANY WHO SHALL ELECT TO COME IN AND CONTRIBUTE TO THE EXPENSE OF THE ACTION, APPELLANT,

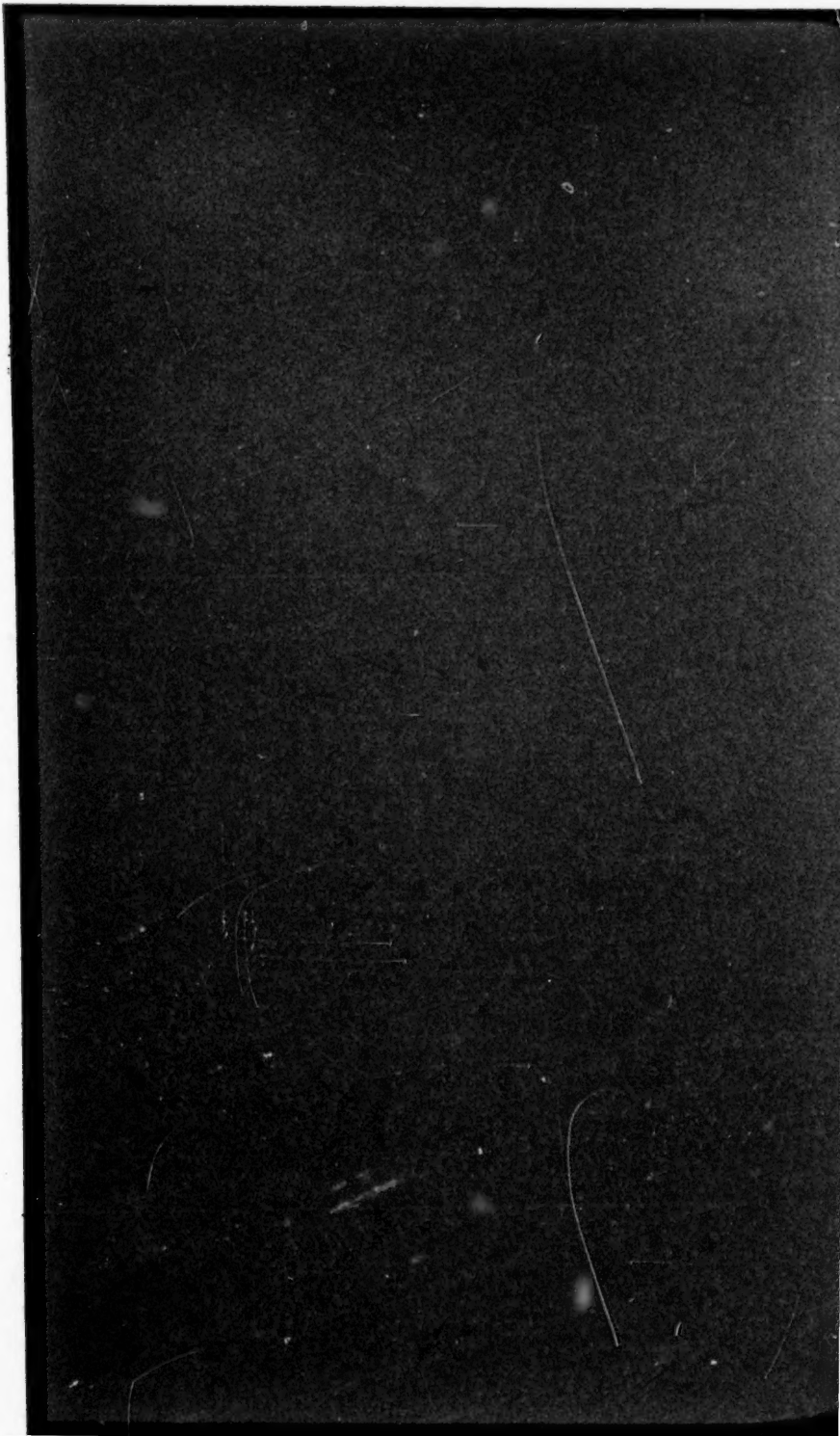
vs.

ARTHUR E. STAM.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

FILED MAY 8, 1916.

(24,207)



(24,207)

PREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 146.

LLIAM M. FLEITMANN, SUING ON BEHALF OF HIMSELF AND ALL OTHER STOCKHOLDERS OF THE CONSOLIDATED STREET LIGHTING COMPANY WHO SHALL ELECT TO COME IN AND CONTRIBUTE TO THE EXPENSE OF THE ACTION, APPELLANT,

vs.

ARTHUR E. SHAW.

EAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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1 *Bill of Complaint.*

(Filed Dec. 6, 1912.)

United States District Court, Southern District of New York.

In Equity. No. 10—37.

WILLIAM M. FLEITMANN, Suing on Behalf of Himself and All Other Stockholders of The Consolidated Street Lighting Company Who Shall Elect to Come in and Contribute to the Expense of the Action, Plaintiff,

against

UNITED GAS IMPROVEMENT COMPANY, THE UNITED LIGHTING & Heating Company, The Welsbach Street Lighting Company of America, The Consolidated Street Lighting Company, William Findlay Brown, Arthur E. Shaw, Randall Morgan, Samuel T. Bodine, and Thomas Dolan, Defendants.

To the Honorable the Judges of the District Court of the United States in and for the Southern District of New York, in Chancery Sitting:

I. Your orator, William M. Fleitmann, a citizen of the State of New York and a resident and an inhabitant in the City and
2 County of New York, in the Southern District of New York, suing on behalf of himself and all other stockholders of The Consolidated Street Lighting Company who shall elect to come in and contribute to the expense of the action, brings this his bill of complaint against the United Gas Improvement Company, a corporation created and duly organized by and under the Laws of the State of Pennsylvania, and having its principal place of business at Philadelphia, in the State of Pennsylvania, and a citizen of said State; The United Lighting & Heating Company, a corporation created and duly organized by and under the Laws of the State of New Jersey, having its principal place of business at Gloucester City, in the State of New Jersey, and a citizen of the State of New Jersey; The Welsbach Street Lighting Company of America, a corporation created and duly organized by and under the Laws of the State of Illinois, and having its principal place of business at Chicago, in the State of Illinois, and a citizen of the State of Illinois; The Consolidated Street Lighting Company, a corporation created and duly organized by and under the Laws of the State of Maine, and having its principal place of business at Portland, in the State of Maine, and a citizen of that State, and William Findlay Brown, Arthur E. Shaw, Randall Morgan, Samuel T. Bodine and Thomas Dolan each of whom is a resident of the City of Philadelphia and State of Pennsylvania, and a citizen of the State of Pennsylvania.

II. And thereupon your orator complains and says that in the year 1906 the defendant The Consolidated Street Lighting Company

was organized for the purpose of engaging in the business of
3 securing contracts for municipal lighting and of furnishing street lamps and other lighting accessories for the city, municipal and legal authorities throughout the United States. The said The Consolidated Street Lighting Company after its organization began business and entered into business competition in the United States to obtain contracts for municipal lighting, and acquired all or nearly all the issued and outstanding capital stock of the American Street Lamp & Supply Company, a corporation which had been and then was in active competition in said business with the defendants. Among the competitors of The Consolidated Street Lighting Company and of The American Street Lamp & Supply Company were the defendants United Gas Improvement Company, The United Lighting & Heating Company and The Welsbach Street Lighting Company of America, and other companies subsidiary thereto or controlled thereby. The defendant The Consolidated Street Lighting Company after its organization maintained an independent organization not controlled by any outside persons or corporations, and expended large amounts of money in order that it might conduct a large and competitive business through itself and through the said The American Street Lamp & Supply Company.

III. And your orator further shows unto your Honors that the total authorized capital stock of The Consolidated Street Lighting Company was and is $1,000,000, consisting of 10,000 shares of the par value of $100 each.

IV. Your orator further shows unto your Honors that shortly subsequent to the organization of said company and prior to
4 the acts hereinafter complained of the above-named plaintiff became the holder and owner of 1,011 shares of the stock of said defendant The Consolidated Street Lighting Company, and that the plaintiff ever since has been and still is the holder and owner of such shares.

V. Upon information and belief, your orator further shows unto your Honors that in the year 1899 the defendant United Gas Improvement Company caused to be organized the defendant The United Lighting & Heating Company. That all or substantially all of the capital stock of the said The United Lighting & Heating Company was and is owned or controlled by the said United Gas Improvement Company. That the defendant The Welsbach Street Lighting Company of America was organized in the year 1896, and that all or substantially all of the stock of said The Welsbach Street Lighting Company of America was at all the times hereinafter mentioned owned or controlled by said defendants United Gas Improvement Company and The United Lighting & Heating Company.

VI. Upon information and belief, your orator further shows unto your Honors that at all times hereinafter mentioned the defendant Arthur E. Shaw was the president or other executive officer and a director of the defendant The Welsbach Street Lighting Company of America, and was the secretary or other executive officer and a director of the defendant The United Lighting & Heating Company, and was an officer or director or both of various of the controlled or subsidiary companies hereinafter referred to.

5 That the defendants Randall Morgan, Samuel T. Bodine and Thomas Dolan were respectively executive officers of the defendant United Gas Improvement Company, said Morgan being also a director of The United Lighting & Heating Company and constituting the most active and influential members of what was known as the "Committee," which said Committee determined and directed the general operations and policy of said defendant companies and of the controlled or subsidiary companies hereinafter referred to, and that the defendants above named and each of them, together with the defendant William Findlay Brown, were fully cognizant of and actually participated in and directed and authorized the various steps and acts hereinafter complained of.

That the said William Findlay Brown was a director in and officer of the Welsbach Street Lighting Company of America and of The United Lighting & Heating Company.

VII. Upon information and belief, your orator further shows unto your Honors that prior to the year 1906 and ever since, the defendants other than the Consolidated Street Lighting Company, individually and collectively with other persons and companies whose names are unknown to the plaintiff, entered into, maintained and carried out a combination and conspiracy to control throughout the United States the business of securing contracts for municipal lighting and of supplying lamps and other lighting accessories. In pursuance of said general scheme and purpose, said defendants were engaged in secretly and illegally acquiring other companies con-

6 ducting or about to conduct a similar or competitive business.

VIII. And your orator further shows unto your Honors that to carry out said combination and conspiracy and the purposes thereof, and to accomplish the same, the defendants other than the Consolidated Street Lighting Company caused to be organized and acquired various companies engaged in the municipal lighting business and in enterprises connected therewith. The organization and business policy of said newly organized and acquired companies was completely controlled by the said defendants. Said companies were apparently competing with the defendant companies, while in reality and in truth all their acts were done for and on behalf of the defendants other than The Consolidated Street Lighting Company. The purpose of organizing and acquiring said companies was to deceive the public generally and in particular municipal and other legal authorities and those engaged in the municipal lighting business. Said companies interposed bids for lighting contracts and otherwise conducted themselves as independent companies. In reality and in truth the appearance of competition sought to be created thereby was a sham and subterfuge calculated to deceive and was directly managed and controlled by the defendants other than The Consolidated Street Lighting Company.

IX. And your orator, upon information and belief, further shows unto your Honors that the purpose of organizing and conducting said companies was to enable the defendants other than The Consolidated Street Lighting Company, the more effectually to control and monopolize the business of municipal lighting in all parts of the

United States, and the foregoing acts were calculated to effect
7 such purpose and to prevent others from competing with the defendants other than The Consolidated Street Lighting Company by driving them out of business or preventing them from becoming competitive factors in interstate commerce. Among said companies so organized or acquired and conducted by defendants other than The Consolidated Street Lighting Company were the following:

The Pennsylvania Globe Gas Light Company, a Pennsylvania corporation:

The New York & New Jersey Globe Gas Light Company (Ltd.), a New York corporation;

The Globe Light & Heat Company, an Illinois corporation;

The Rising Sun Street Lighting Company, a Maine corporation;

The Sun Vapor & Gas Street Lighting Company, a West Virginia corporation;

The Paterson Street Lighting Company, a corporation;

The American Development Company, a Minnesota corporation;

The Cleveland Street Lighting Company, an Ohio corporation;

The Carbon Light & Power Company, a New Jersey corporation;

The American Lighting Company, a Maryland corporation, and various others.

And, upon information and belief, your orator further shows unto your Honors that more than a majority of the stock of said corporations mentioned or referred to in this paragraph IX was controlled and secretly acquired, and said corporations were controlled by the defendants United Gas Improvement Company, The
8 United Lighting & Heating Company, and The Welsbach Street Lighting Company of America. The facts that said corporations were dummy corporations, or that a majority of their stock was owned and controlled and that they were controlled by the defendant companies other than The Consolidated Street Lighting Company; that the bids made by said companies from time to time for securing municipal lighting contracts were controlled and directed by said defendants; that the entire organization and scheme of said corporations were in accordance with the prearranged designs and plans of said defendants, were kept secret from the public, from the trade and from all the municipal and legal authorities.

X. And your orator further shows unto your Honors that the defendants The Consolidated Street Lighting Company, United Gas Improvement Company, The United Lighting & Heating Company and The Welsbach Street Lighting Company of America, as well as the other corporations mentioned or referred to in paragraph IX above were engaged in interstate commerce in various parts of the United States, in making contracts with municipalities and other legal authorities, and in causing to be transferred from various States of the United States to other States of the United States the mantles, burners and other materials necessary for carrying out and fulfilling such public lighting contracts.

XI. And on information and belief, your orator further shows unto your Honors that shortly after the organization of the defend-

ant The Consolidated Street Lighting Company, the other defendants, realizing that The Consolidated Street Lighting Company would be a strong competitor in the municipal lighting business,
9 individually and collectively and with other persons and companies whose names are unknown to the plaintiff, in pursuance of the general scheme and purpose aforesaid to acquire control of the municipal lighting business, wantonly, wrongfully, maliciously and unlawfully and in violation of the provisions of the Act of Congress approved July 2nd, 1890 (26 Statutes at Large, 209, Chap. 647, U. S. Compiled Statutes 1901, p. 3200), and entitled "An Act to Protect Trade and Commerce against Unlawful Restraints and Monopoly," and with intent to injure the property and business of the defendant The Consolidated Street Lighting Company, by means of acts done which are forbidden and declared to be unlawful by said Act of Congress, combined, conspired, confederated and agreed together to restrain the defendant The Consolidated Street Lighting Company from carrying on the municipal lighting business in the several States of the United States, and wholly to prevent said defendant from engaging in and carrying on said business, and to drive said The Consolidated Street Lighting Company out of business as a competitor, thereby injuring said Company in its property and business, and have so combined, conspired, confederated and agreed together ever since.

XII. And upon information and belief your orator further shows unto your Honors that in pursuance of said combination and conspiracy, and to carry the same into effect, the defendants other than The Consolidated Street Lighting Company did cause offers to be made through the agency of one Wesley S. Block to the persons owning the majority of the stock and in control of The Consolidated Street Lighting Company to furnish a large amount of work-
10 ing capital to said The Consolidated Street Lighting Company, provided that there was sold to him the majority stock and controlling interest in said company. That said Block at the time of said offers stated and represented that he was acting for certain individuals who refused to have their names divulged in the transaction, but that said persons were hostile to the defendants other than The Consolidated Street Lighting Company and were ready and anxious to compete vigorously with such defendants, and that if said unknown persons could obtain control of The Consolidated Street Lighting Company it would enable them to compete vigorously with such defendants and to prevent said defendants from securing a further monopoly of the interstate trade and commerce and the lighting business, and that all necessary capital for such competition would be supplied by the said Block, and his undisclosed principals.

XIII. And on information and belief your orator further shows unto your Honors that relying on said Block's statements described above, and believing them to be true, and induced thereby, the persons owning the majority of the stock and controlling interest in The Consolidated Street Lighting Company, believing that they were furthering the interests of The Consolidated Street Lighting Com-

pany and of all of its stockholders, did transfer their shares of stock in The Consolidated Street Lighting Company to the said Block. The shares of stock so transferred were taken by said Block in his own name and apparently for himself, but in truth and reality said Block was only the agent of the defendants other than The Consolidated Street Lighting Company to acquire said stock with
11 their money, for their use and on their behalf.

XIV. And your orator further shows unto your Honors that at the time of said negotiations defendant The Consolidated Street Lighting Company had successfully commenced its operations in the municipal street lighting business. Valuable contracts had been secured by The American Street Lamp & Supply Company. Bids had been interposed and preparations made for securing many other profitable contracts, both for The Consolidated Street Lighting Company and The American Street Lamp & Supply Company. The success of The Consolidated Street Lighting Company was assured and its prospects were for an increasingly large and profitable business.

XV. And upon information and belief your orator further shows unto your Honors that at the time of or shortly after the transfer of the majority of the stock and controlling interest in The Consolidated Street Lighting Company to said Block, the defendants elected or caused to be elected, said Block to the presidency, and accepted or caused to be accepted, the resignations of the directors of the company, but failed and neglected to elect or cause to be elected, any new directors except dummy directors who were clerks in the office of the attorneys for defendant companies other than The Consolidated Street Lighting Company. At the same time said defendants acquired control of The American Street Lamp & Supply Company, electing or causing to be elected the directors of said company and failing to act or cause to be acted on the resignation of the
12 president of said company for more than a year after the same had been tendered.

XVI. And your orator further shows unto your Honors that from said time defendants, in pursuance of their combination and conspiracy aforesaid, adopted every scheme and used every method in their power to bring about the downfall of The Consolidated Street Lighting Company. On information and belief, acting through the agency of said Block, the defendants other than The Consolidated Street Lighting Company caused the said The American Street Lamp & Supply Company to interpose bids for lighting contracts which said defendants knew would be useless and unsuccessful. That these defendants made or caused to be made by companies other than defendant The Consolidated Street Lighting Company bids which were lower than those which they caused The American Street Lamp & Supply Company to make, rendering it certain that the bids of The American Street Lamp & Supply Company would not be accepted. By thus causing The American Street Lamp & Supply Company to make bids that were inordinately high, defendants caused great loss and damage to the business of The American Street Lamp & Supply Company and The Consolidated Street Lighting Company, losing

for them the opportunity of securing many valuable contracts which they otherwise would have had.

XVII. And, upon information and belief, your orator further shows unto your Honors that in pursuance of their unlawful combination and conspiracy defendants caused the credit of The Consolidated Street Lighting Company to be impaired and injured.

13 The promised working capital was not furnished by said Block or Block's principals for conducting the business of The Consolidated Street Lighting Company. On information and belief, the defendants, other than The Consolidated Street Lighting Company, withheld the money necessary for the regular transaction of the business of The Consolidated Street Lighting Company and The American Street Lamp & Supply Company, preventing salaries from being paid. Overdue accounts were allowed to remain unpaid and obligations for supplies and other materials necessary for the transaction of the business of The Consolidated Street Lighting Company were not met or even attempted to be met, although funds were available with which to make such payments.

XVIII. And, upon information and belief, your orator further shows unto your Honors that the business which The Consolidated Street Lighting Company had secured was also hampered and sought to be destroyed by defendants. Contracts previously obtained by The American Street Lamp & Supply Company were caused to be neglected and unsatisfactorily performed. Defendants caused The Consolidated Street Lighting Company and The American Street Lamp & Supply Company to delay in all of their business undertakings so that punctuality in the performance of their contractual obligations became impossible. Complaints for delays, unsatisfactory work and unpaid obligations became frequent and greatly injured the good name, credit and business prospects of The Consolidated Street Lighting Company. Said defendants, further to effectuate their unlawful projects and to bring about more quickly the

14 ruin of The Consolidated Street Lighting Company, caused the manager of The Consolidated Street Lighting Company to devote himself to minor details of the business and to matters of little importance, thus preventing him, and for the purpose of preventing him, from superintending the performance of existing contracts and from attempting to secure new contracts.

XIX. And your orator further shows unto your Honors that by the above described and other methods the defendants caused the business of The Consolidated Street Lighting Company to lessen and deteriorate steadily, and the stock of The American Street Lamp & Supply Company owned by said The Consolidated Street Lighting Company to become worthless, and in or about the year 1910 caused The Consolidated Street Lighting Company to discontinue its operations and abandon its business, and The American Street Lamp & Supply Company to be dissolved.

XX. And your orator further shows unto your Honors that each and all of the said acts described and referred to were done and performed by the defendants (other than The Consolidated Street Lighting Company) and each of them in pursuance of said combination, conspiracy and agreement and to effectuate the objects and purposes

thereof, and with unlawful intent and purpose as hereinbefore alleged, and that by means of said acquisition and control of said The Consolidated Street Lighting Company and of the acts in connection therewith and subsequent thereto, said defendants have effected and accomplished their plan and purpose in that the business of said The Consolidated Street Lighting Company has been utterly de
15 stroyed and ruined and the competition thereof has been rendered impossible, and the monopoly which said defendants had conspired to secure has been thereby increased, and that the said The Consolidated Street Lighting Company has been wholly deprived of the large profits which it could and would have secured had it not been prevented and restrained as aforesaid from engaging in competitive business with said defendant companies, and from the use of its property and franchises, trade and commerce between the several States of the United States, and that the stock of the plaintiff in said The Consolidated Street Lighting Company and the stock of all the other stockholders of said company has been rendered absolutely worthless.

XXI. And your orator further shows unto your Honors that this suit is not a collusive one to confer on a Court of the United States jurisdiction of a case of which it would not otherwise have cognizance.

XXII. And your orator further shows unto your Honors that prior to the commencement of this action plaintiff had duly demanded of The Consolidated Street Lighting Company and its officers, to institute proceedings and seek relief similar to that sought herein, but said corporation and officers have refused and neglected to take such action or to institute proceedings. Even if said corporation and its officers did commence action, such action would not be prosecuted with diligence and in good faith, as said corporation and its officers are wholly controlled and directed by the other defendants as hereinabove described.

XXIII. And on information and belief, your orator fur-
16 ther shows unto your Honors that except for the unlawful acts of the defendants other than The Consolidated Street Lighting Company hereinabove alleged, the contracts, property, good will, assets of every kind, nature and description of said The Consolidated Street Lighting Company would prior to the commencement of this suit have become and been worth the sum of $1,000,000, which is the authorized and outstanding capital of said company.

XXIV. And your orator further shows unto your Honors that The Consolidated Street Lighting Company has been injured in its business and property by reason of said combination and conspiracy, and the acts of the defendants done in pursuance thereof and to carry the same into effect which are declared to be unlawful by said Act of Congress to the amount of $1,000,000, to recover threefold which damages under Section 7 of said Act this suit is brought.

XXV. And forasmuch as your orator can have no adequate relief except in this court and to the end that the defendants may, if they can, show why your orator should not have the relief herein prayed for, and each according to his or its best and utmost knowledge, information and belief, but not under oath (answer under oath being

hereby expressly waived), full, true, direct and perfect answer make to all and singular the matters and things stated and charged, and may be decreed to pay over to your orator all damages and losses caused to your orator by the said unlawful acts of said defendants, or either of them, your orator prays:

1. That the defendants may be required to answer the premises.

17 2. That the defendants other than The Consolidated Street Lighting Company may be decreed to pay over to defendant The Consolidated Street Lighting Company the sum of $3,000,000 pursuant to Section 7 of the Act of Congress hereinabove mentioned, and

3. That the defendants other than The Consolidated Street Lighting Company may be compelled to pay the costs of this suit.

May it please your Honors to grant unto your orator a writ of subpœna ad respondendum to issue out of and under the seal of this Honorable Court directed to the said defendants United Gas Improvement Company, The United Lighting & Heating Company, The Welsbach Street Lighting Company of America, The Consolidated Street Lighting Company, William Findlay Brown, Arthur E. Shaw, Randall Morgan, Samuel T. Bodine and Thomas Dolan, commanding them and each of them at a certain time therein to be named and under a certain penalty therein to be limited, to be and appear before this Honorable Court, then and there to answer unto this bill of complaint and to perform and abide by such order and decree in the premises as to this Honorable Court shall seem meet and to be required by the principles of equity and good conscience.

And your orator as in duty bound will ever pray, etc.

HIRSCH, SCHEUERMAN & LIMBURG,
Solicitors for Complainant.

Office & P. O. Address, 160 Broadway, New York, Borough of Manhattan.

HERBERT R. LIMBURG,
Of Counsel.

18 STATE OF NEW YORK,
County of New York, ss:

William M. Fleitmann, being first duly sworn, deposes and says that he is the complainant named in the foregoing bill of complaint; that he has read the said bill and knows the contents thereof and that the same is true of his own knowledge except as to those matters therein stated to be alleged on information and belief, and as to such matters he believes it to be true.

WM. M. FLEITMANN.

Subscribed and sworn to before me this 29th day of November, 1912.

[SEAL.] ARTHUR H. RYAN,
Notary Public, No. 112, New York County.

19 *Notice of Motion to Dismiss Bill of Complaint as Against the Defendant Arthur E. Shaw.*

(Filed Apr. 4, 1913.)

United States District Court, Southern District of New York.

In Equity.

No. 10—37.

WILLIAM M. FLEITMANN, Suing on Behalf of Himself and All Other Stockholders of The Consolidated Street Lighting Company Who Shall Elect to Come in and Contribute to the Expense of the Action, Plaintiff,

against

UNITED GAS IMPROVEMENT COMPANY, THE UNITED LIGHTING & Heating Company, The Welsbach Street Lighting Company of America, The Consolidated Street Lighting Company, William Findlay Brown, Arthur E. Shaw, Randall Morgan, Samuel T. Bodine, and Thomas Dolan, Defendants.

GENTLEMEN: Take notice that, upon the bill of complaint in this action this Honorable Court will be moved, for and on behalf of the defendant Arthur E. Shaw, at the Federal Court Rooms in the Post Office Building in the Borough of Man-
20 hattan, City of New York, on the 7th day of March, 1913, at the opening of court on that day, or as soon thereafter as counsel can be heard, to dismiss the bill of complaint herein, for points of law appearing upon the face of the bill, to wit: insufficiency of fact to constitute a valid cause of action in equity; that there is no jurisdiction in equity to grant the relief prayed by said bill against this defendant; that compliance has not been made in said bill with the requirements of Rule 27 (formerly Rule 94) of the Equity Rules of this Court, in that the bill fails to set forth with sufficient particularity the efforts of the plaintiff to secure such action as he desires on the part of the managing directors and of the shareholders of Consolidated Street Lighting Company, and the causes of his failure to obtain such action, and for such other or further relief as may be just in the premises, together with the costs of this motion.

Dated, New York City, February 26th, 1913.

Yours, etc.,

HATCH & SHEEHAN,
Solicitors for the Defendant Arthur E. Shaw.

Office and Post Office Address, 14 Wall Street, Borough of Manhattan, New York City.

To Messrs. Hirsch, Scheuerman & Limburg, Solicitors for Complainant.

21 *Opinion.*

(Filed Apr. 4, 1913.)

United States District Court, Southern District of New York.

WILLIAM M. FLEITMANN, Suing on Behalf of Himself and All Other Stockholders of The Consolidated Street Lighting Company Who Shall Elect to Come in and Contribute to the Expense of the Action, Plaintiff,

against

UNITED GAS IMPROVEMENT COMPANY, THE UNITED LIGHTING & Heating Company, The Welsbach Street Lighting Company of America, The Consolidated Street Lighting Company, William Findlay Brown, Arthur E. Shaw, Randall Morgan, Samuel T. Bodine, and Thomas Dolan, Defendants.

COXE, *J.:*

The defendants, The Welsbach Street Lighting Company of America and Arthur E. Shaw, move to dismiss the bill on the following grounds:

First. The bill fails to state a cause of action.

Second. The Court has no jurisdiction to grant the relief prayed for.

22 Third. Failure to comply with Equity Rule No. 27.

The relief prayed for by the complainant is that the defendants, other than The Consolidated Street Lighting Company, may be decreed to pay over to said company the sum of $3,000,000 treble damages under Section 7 of the Anti-Trust Law, and the costs of this action.

The bill alleges that the complainant is a stockholder in the defendant, The Consolidated Company, and, prior to 1906, the defendants, other than said company, entered into a conspiracy to control, throughout the United States, the business of securing contracts for municipal lighting and supplying lamps and other lighting accessories. This conspiracy was, it is alleged, carried out by organizing other, apparently independent and competing companies, but which were in fact under the control of the defendants other than The Consolidated Company. It is asserted that by means of such dummy corporations, the conspiring defendants endeavored to monopolize interstate commerce in the materials necessary for carrying out public lighting contracts. That these defendants, realizing that the Consolidated Company would be a strong competitor in the business of municipal lighting, agreed and conspired together to prevent the Consolidated Company from carrying on such business in the United States and to drive said company out of business. It is alleged further that, in pursuance of the said conspiracy, the said defendants acquired, through fraud and fraudulent representations, a majority of the stock in said Consolidated Company and placed in control thereof creatures of

their own and adopted every method in their power to wreck and destroy the said Consolidated Company. That they succeeded in accomplishing this result and, in 1910, caused the Consoli-
23 dated Street Lighting Company to discontinue its operations and abandon its business, the result being that the business has been destroyed and the stock is worthless. The bill also alleges that prior to this suit, the plaintiff demanded of the officers of the Consolidated Company that they would bring an action asking relief similar to that now demanded, but they have refused to bring such action. It is alleged that but for the unlawful acts of the defendants, the property, good will and assets prior to the commencement of this suit would have been worth $1,000,000.

The foregoing statement shows sufficiently the intent and purpose of the action.

The question presented by these motions, briefly stated, is whether, when it appears that a number of individuals and corporations have conspired together to wreck a corporation and have succeeded in doing so, a single minority shareholder of such corporation, after the directors and majority shareholders have declined to act, can maintain a suit in equity and recover threefold damages against the conspirators under Section 7 of the Anti-Trust Act?

So far as the seventh section of the Act is concerned, it has been uniformly construed to refer only to an action at law. It permits a person—which word, by the eighth section, includes a corporation—to bring an action at law to recover treble damages. Nowhere in the Act is the right given to an individual to proceed in equity.

Blindell v. Hagan, 54 Fed. Rep., 40; 56 Fed. Rep., 696;
Greer, Mills & Co. v. Stoller, 77 Fed. Rep., 1;
24 Gulf C. & S. F. Ry. Co. v. Miami S. S. Co., 86 Fed. Rep., 407;
National Fire Proofing Company v. Mason Builders' Association et al., 169 Fed. Rep., 259.

In National Fire Proofing Co. v. Mason, cited above, the Circuit Court of Appeals for this circuit said, at p. 263:

"With respect to the Federal statute, it is not obvious in what way a trade agreement between builders and bricklayers, relating to their work in the State of New York, can be said to directly affect interstate commerce; but the consideration of this question is not necessary, because a person injured by a violation of the Federal Act cannot sue for an injunction under it. The injunctive remedy is available to the Government only. An individual can only sue for threefold damages."

These authorities would seem to dispose of these motions. An individual cannot maintain a suit in equity under the Anti-Trust Act. The complainant is an individual, and this is such a suit. An individual can sue only for threefold damages under the Act, and this must be in a suit at law. The complainant here is suing for threefold damages in a suit in equity. The defendants are entitled to have the facts passed on by a jury, but here they are deprived of such

right. In short, the complainant is asking relief under a statute, the provisions of which he has failed to follow.

The Consolidated Company could bring an action at law under the permission implied in Section 8, but where in the law is
25 the right given to a single shareholder to maintain such an action? A law which grants such drastic relief must be strictly construed; the right to maintain an action not mentioned in the law cannot be implied. It will not do to say that the extraordinary remedy here invoked is necessary and should be implied. If such tremendous power is to be given a single shareholder, the appeal should be made to the legislative and not the judicial branch of the Government. It is unnecessary to determine whether a single shareholder can maintain an action at law under the seventh section for the reason that this is not such an action. Other questions have been discussed but I do not deem it essential or wise to extend this decision beyond the precise point involved.

What I decide is that an equity suit cannot be maintained under Section 7 of the Anti-Trust Act by a single stockholder to recover threefold damages for injuries sustained by his corporation.

The motions to dismiss the bill are granted.

April 4, 1913.

26 *Decree.*

At a Stated Term of the United States District Court, Held in the Federal Court Rooms in the Post Office Building, in the Borough of Manhattan, City of New York, for the Southern District of New York, on the 14th Day of April, 1913.

Present: Hon. Alfred C. Coxe, Acting District Judge.

(Filed Apr. 15, 1913.)

In Equity.

No. 10—37.

WILLIAM M. FLEITMANN, Suing on Behalf of Himself and All Other Stockholders of The Consolidated Street Lighting Company Who Shall Elect to Come in and Contribute to the Expense of the Action, Plaintiff,

against

UNITED GAS IMPROVEMENT COMPANY, THE UNITED LIGHTING & Heating Company, The Welsbach Street Lighting Company of America, The Consolidated Street Lighting Company, William Findlay Brown, Arthur E. Shaw, Randall Morgan, Samuel T. Bodine, and Thomas Dolan, Defendants.

This cause came on to be heard at this term upon a motion made by the defendant Arthur E. Shaw to dismiss the bill of
27 complaint for points of law appearing upon the face of the bill, to wit, insufficiency of fact to constitute a valid cause of

action in equity; that there is no jurisdiction in equity to grant the relief prayed by said bill against the defendant; failure to comply with Equity Rule No. 27, and was argued by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged and decreed as follows, viz.: That the motion to dismiss the bill be granted; that plaintiffs bill filed in this case be and is hereby dismissed as to the defendant Arthur E. Shaw on the ground that an equity suit cannot be maintained under Section 7 of the Anti-Trust Act by a single stockholder to recover threefold damages for injuries sustained by his corporation; that the defendant Arthur E. Shaw be hence dismissed without a day.

ALFRED C. COXE,
U. S. J.

28 *Petition for Appeal and Order Allowing Same.*

(Filed May 17, 1913.)

District Court of the United States, Southern District of New York.

In Equity.

No. 10—37.

WILLIAM M. FLEITMANN, Suing on Behalf of Himself and All Other Stockholders of The Consolidated Street Lighting Company Who Shall Elect to Come in and Contribute to the Expense of the Action, Complainant-Appellant,

against

UNITED GAS IMPROVEMENT COMPANY, THE UNITED LIGHTING & Heating Company, The Welsbach Street Lighting Company of America, The Consolidated Street Lighting Company, William Findlay Brown, Arthur E. Shaw, Randall Morgan, Samuel T. Bodine, and Thomas Dolan, Defendants-Appellees.

Appeal of the Complainant William M. Fleitmann, Suing on Behalf of Himself and All Other Stockholders of The Consolidated Street Lighting Company Who Shall Elect to Come in and Contribute to the Expense of the Action and His Petition for Allowance of said Appeal.

29 To the Honorable Judges of the Circuit Court of Appeals of the United States, Second Circuit, and of the District Court of the United States for the Southern District of New York:

The complainant in the above-entitled cause, William M. Fleitmann, suing on behalf of himself and all other stockholders of The Consolidated Street Lighting Company who shall elect to come in and contribute to the expense of the action, considering that he is aggrieved by the order or decree made herein on the 14th day of April, 1913, and entered herein on the 15th day of April, 1913,

dismissing his suit as against the defendant Arthur E. Shaw as therein provided, hereby appeals therefrom and from the whole and every part thereof to the United States Circuit Court of Appeals for the Second Circuit, and hereby prays that this appeal may now be allowed and that a citation may be issued accordingly, and that a transcript of the record, papers and proceedings upon which said order or decree was made, duly authenticated, may be sent to the said Circuit Court of Appeals, and that said order or decree may be reversed with costs, and for such other or further relief as may be meet and just.

And so the complainant will ever pray, etc.

HIRSCH, SCHEUERMAN & LIMBURG,
Solicitors for Complainant-Appellant.

160 Broadway, Borough of Manhattan, City of New York.

And now, to wit, on the 16th day of May, 1913, it is ordered that the above appeal be allowed as prayed for.

GEO. C. HOLT, *D. J.*

30 *Assignment of Errors.*

(Filed May 16, 1913.)

District Court of the United States, Southern District of New York.

In Equity.

No. 10—37.

WILLIAM M. FLEITMANN, Suing on Behalf of Himself and All Other Stockholders of The Consolidated Street Lighting Company Who Shall Elect to Come in and Contribute to the Expense of the Action, Complainant-Appellant,

against

UNITED GAS IMPROVEMENT COMPANY, THE UNITED LIGHTING & Heating Company, The Welsbach Street Lighting Company of America, The Consolidated Street Lighting Company, William Findlay Brown, Arthur E. Shaw, Randall Morgan, Samuel T. Bodine, and Thomas Dolan, Defendants-Appellees.

Now comes the complainant, William M. Fleitmann, above named, suing on behalf of himself and all other stockholders of The Consolidated Street Lighting Company who shall elect to come in and contribute to the expense of the action, by his solicitors, and presents the accompanying petition for appeal from the decree herein dated the 14th day of April, 1913, and entered on the 15th day of April, 1913, for the following assignments of error and submits that
31 the District Court of the United States for the Southern District of New York and the Honorable Judge thereof who made said decree, in dismissing this suit by said decree as against

the defendant Arthur E. Shaw erred in the following particulars, to wit:

First. In that the Court found and held that an equity suit cannot be maintained by a single stockholder of a corporation under the provisions of Section 7 of the Act of Congress approved July 2, 1890 (26 Statutes at Large, 209, Chap. 647, U. S. Compiled Statutes 1901, p. 3200) to recover threefold damages for injuries sustained by the corporation.

Second. In that the Court found and held that an equity suit cannot be maintained under the provisions of Section 7 of the Act of Congress approved July 2, 1890 (26 Statutes at Large, 209, Chap. 647, U. S. Compiled Statutes 1901, p. 3200), by a single stockholder suing on behalf of himself and all other stockholders of a corporation similarly situated who shall elect to come in and contribute to the expense of the action to recover threefold damages on behalf of the corporation for injuries sustained by the corporation.

Third. In that the Court found and held that the bill of complaint herein does not set forth a good cause of action in equity.

Fourth. In that the Court found and held that the plaintiff's bill filed in this case be dismissed as to the defendant Arthur E. Shaw.

Wherefore, the complainant prays that the said decree may be reversed and that the said District Court of the United States
32 be directed by the mandate of the United States Circuit Court of Appeals for the Second Circuit to enter an order and decree vacating and reversing the said decree herein with costs to complainant, and complainant further prays for such other or further relief as shall seem just in the premises.

Dated, New York, May 16th, 1913.

HIRSCH, SCHEUERMAN & LIMBURG,
Solicitors for Complainant.

160 Broadway, Manhattan, New York City.

Memorandum as to Filing of Bond.

An appeal bond in the sum of $250 was approved by Judge Holt on the 16th day of May, 1913, and was filed in the office of the Clerk of the District Court of the United States for the Southern District of New York on the 17th day of May, 1913.

33 *Citation.*

By the Honorable, One of the Judges of the District Court of the United States for the Southern District of New York, in the Second Circuit.

To Arthur E. Shaw, Greeting:

You are hereby cited and admonished to be and appear before a United States Circuit Court of Appeals for the Second Circuit, to be holden at the Borough of Manhattan, in the City of New York, in

the District and Circuit above named, on the 14th day of June, 1913, pursuant to an appeal filed in the Clerk's office of the District Court of the United States for the Southern District of New York, wherein William M. Fleitmann, suing on behalf of himself and all other stockholders of The Consolidated Street Lighting Company who shall elect to come in and contribute to the expense of the action, is appellant and you are appellee to show cause, if any there be, why the decree in said appeal mentioned should not be corrected and speedy justice should not be done in that behalf.

Given under my hand at the Borough of Manhattan, in the City of New York, in the District and Circuit above named, this 16th day of May, in the year of our Lord One Thousand Nine Hundred and Thirteen, and of the Independence of the United States the One Hundred and Thirty-seventh.

GEO. C. HOLT,
Judge of the District Court of the United States for the Southern District of New York, in the Second Circuit.

(Endorsed: Filed May 20, 1913. Service of a copy of the within is hereby admitted. Dated N. Y., May 19, 1913. Hatch & Sheehan, Attys. for appellee Shaw.)

34 *Order Approving Præcipe.*

(Filed June 5, 1913.)

United States District Court, Southern District of New York.

In Equity.

No. 10—37.

WILLIAM M. FLEITMANN, Suing on Behalf of Himself and All Other Stockholders of The Consolidated Street Lighting Company Who Shall Elect to Come in and Contribute to the Expense of the Action, Plaintiff,

vs.

UNITED GAS IMPROVEMENT COMPANY, THE UNITED LIGHTING & Heating Company, The Welsbach Street Lighting Company of America, The Consolidated Street Lighting Company, William Findlay Brown, Arthur E. Shaw, Randall Morgan, Samuel T. Bodine, and Thomas Dolan, Defendants.

Upon reading the annexed præcipe and stipulation dated June 5, 1913, by and between the solicitors for the complainant and defendant Shaw in the above-entitled case, it is

Ordered that the Clerk prepare and certify the transcript of record on the appeal taken by the complainant from the decree dated April

14, 1913, dismissing the bill of complaint as against defendant Arthur E. Shaw in accordance with said stipulation and præcipe.

Dated, June 5, 1913.

ALFRED C. COXE,
Acting U. S. D. J.

35 *Stipulation.*

United States District Court, Southern District of New York.

In Equity.

No. 10—37.

WILLIAM M. FLEITMANN, Suing on Behalf of Himself and All Other Stockholders of The Consolidated Street Lighting Company Who Shall Elect to Come in and Contribute to the Expense of the Action, Plaintiff,

vs.

UNITED GAS IMPROVEMENT COMPANY, THE UNITED LIGHTING & Heating Company, The Welsbach Street Lighting Company of America, The Consolidated Street Lighting Company, William Findlay Brown, Arthur E. Shaw, Randall Morgan, Samuel T. Bodine, and Thomas Dolan, Defendants.

It is hereby stipulated that the Clerk of the District Court of the United States for the Southern District of New York may certify the transcript of record on appeal in accordance with the præcipe hereto annexed.

Dated, June 5th, 1913.

HIRSCH, SCHEUERMAN & LIMBURG,
Solicitors for Plaintiff-Appellant.

HATCH & SHEEHAN,
Solicitors for Defendant-Appellee Shaw.

36 *Præcipe.*

United States District Court, Southern District of New York.

WILLIAM M. FLEITMANN, Suing on Behalf of Himself and All Other Stockholders of The Consolidated Street Lighting Company Who Shall Elect to Come in and Contribute to the Expense of the Action, Plaintiff,

vs.

UNITED GAS IMPROVEMENT COMPANY, THE UNITED LIGHTING & Heating Company, The Welsbach Street Lighting Company of America, The Consolidated Street Lighting Company, William Findlay Brown, Arthur E. Shaw, Randall Morgan, Samuel T. Bodine, and Thomas Dolan, Defendants.

Præcipe.

To the Clerk:

You are hereby requested to certify the transcript of record to be filed in the United States Circuit Court of Appeals for the Second Circuit pursuant to an appeal allowed in the above-entitled case on the 16th day of May, 1913, and to include therein the following and no other papers, viz:

37 Bill of complaint.

Notice of motion to dismiss bill of complaint as against the defendant Arthur E. Shaw.

Opinion of District Court.

Decree.

Petition for appeal and order allowing same.

Assignment of errors.

Memorandum as to filing of bond.

Citation.

Præcipe.

Stipulation and order approving præcipe.

Stipulation re certification.

Clerk's certificate.

Yours, etc.,

HIRSCH, SCHEUERMAN & LIMBURG,
Solicitors for Complainant.

160 Broadway, Manhattan, New York City.

38 *Stipulation re Certification.*

It is hereby stipulated that the foregoing printed copy is a true transcript of the record in the above-entitled case and the whole thereof now on file in the office of the Clerk of the District Court

of the United States for the Southern District of New York, and that said clerk may so certify the same.

Dated, New York, June 12th, 1913.

HIRSCH, SCHEUERMAN & LIMBURG,
Solicitors for Plaintiff-Appellant.

HATCH & SHEEHAN,
Solicitors for Defendant-Appellee Shaw.

39 *Clerk's Certificate.*

UNITED STATES OF AMERICA,
Southern District of New York, ss:

In Equity.

No. 10—37.

WILLIAM M. FLEITMANN, Suing on Behalf of Himself and All Other Stockholders of The Consolidated Street Lighting Company Who Shall Elect to Come in and Contribute to the Expense of the Action, Plaintiff,

vs.

UNITED GAS IMPROVEMENT COMPANY, THE UNITED LIGHTING & Heating Company, The Welsbach Street Lighting Company of America, The Consolidated Street Lighting Company, William Findlay Brown, Arthur E. Shaw, Randall Morgan, Samuel T. Bodine, and Thomas Dolan, Defendants.

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States of America for the Southern District of New York, do hereby certify that the foregoing is a correct transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern
40 District of New York, this 13th day of June in the year of our Lord one thousand nine hundred and thirteen, and of the Independence of the said United States the one hundred and thirty-seventh.

[SEAL.] ALEX. GILCHRIST, JR., *Clerk.*

41 United States Circuit Court of Appeals for the Second Circuit, October Term, 1913.

Nos. 92—93.

Argued December 9, 1913. Decided January 13, 1914.

WILLIAM M. FLEITMANN, Complainant-Appellant,
vs.
THE UNITED GAS IMPROVEMENT COMPANY et al., Defendants-Appellees.
(SHAW.)

SAME
vs.
SAME.
(WELSBACH.)

Appeals from the District Court of the United States for the Southern District of New York.

Before Lacombe, Ward, and Rogers, Circuit Judges.

These causes come here upon appeals from decrees dismissing the bills upon motion. Complainant brought suits in equity on his own behalf and on behalf of all other stockholders of the Consolidated Street Lighting Company, not to recover personal damages or a personal judgment, but to compel defendants to pay to the Consolidated Company the amount for which defendants would be liable at law in a direct action by that corporation, because of viola-
42 tions of the Sherman Anti-Trust Act, whereby the Consolidated Company, of which complainant is a minority stockholder has, it is alleged been driven out of business.

Per Curiam:

The opinion of Judge Coxe, sitting in the District Court, which sufficiently sets forth the allegations of the bills and in which we concur, will be found in — F. R., —.

We are clearly of the opinion that an action to recover treble damages under section 7 of the Act must be an action at law, where defendants have the constitutional right to a jury trial.

The sole relief prayed in these bills is that the defendants other than the Consolidated Company, be decreed to pay over to the Consolidated Company treble the damages it has sustained by some violation of the Sherman Act. We find no authority which gives to a court of equity the jurisdiction to make such a decree. There is no prayer for relief which would warrant such a construction of the bill as would merely require the Consolidated Company to sue the other defendants for treble damages under the Statute.

We think the dismissal was proper and affirm the decrees with costs.

H. L. Scheuerman, for the Appellant.
E. W. Hatch, for the Appellees.

43 At a Stated Term of the United States Circuit Court of Appeals in and for the Second Circuit, Held at the Court Rooms, in the Post Office Building, in the City of New York, on the 23rd Day of January, One Thousand Nine Hundred and Fourteen.

Present:

Hon. E. Henry Lacombe,
Hon. Henry G. Ward,
Hon. Henry Wade Rogers,
Circuit Judges.

WILLIAM M. FLEITMANN, Complainant-Appellant,
vs.
UNITED GAS IMPROVEMENT COMPANY et al., Defendants-Appellees.
(SHAW.)

Appeal from the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the decree of said District Court be and it hereby is affirmed with costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

E. H. L.
H. W. R.

44 Endorsed: United States Circuit Court of Appeals, Second Circuit. W. M. Fleitmann vs. United Gas, etc., Co. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed Jan. 27, 1914. William Parkin, Clerk.

45 United States Circuit Court of Appeals for the Second Circuit.

WILLIAM M. FLEITMANN, Suing on Behalf of Himself and All Other Stockholders of The Consolidated Street Lighting Company Who Shall Elect to Come in and Contribute to the Expense of the Action, Plaintiff-Appellant,

against

UNITED GAS IMPROVEMENT COMPANY, THE UNITED LIGHTING & Heating Company, The Welsbach Street Lighting Company of America, The Consolidated Street Lighting Company, William Findlay Brown, Arthur E. Shaw, Randall Morgan, Samuel T. Bodine, and Thomas Dolan, Defendants-Respondents.

Appeal of the Complainant, William M. Fleitmann, Suing on Behalf of Himself and All Other Stockholders of the Consolidated Street Lighting Company Who Shall Elect to Come in and Contribute to the Expense of the Action and His Petition for Allowance of the said Appeal to the Honorable Judges of the Supreme Court of the United States and of the Circuit Court of Appeals of the United States, Second Circuit.

The complainant in the above entitled cause, William M. Fleitmann, suing on behalf of himself and all other stockholders of The Consolidated Street Lighting Company who shall elect to come in and contribute to the expense of the action, considering that he is aggrieved by the order of the United States Circuit Court of Appeals for the Second Circuit in this cause, bearing date the 27th day of January, 1914, affirming the decree of the District Court of the United States for the Southern District of New York entered
46 in the office of the Clerk of said Court on the 15th day of April, 1913, dismissing the bill herein as to the defendant Arthur E. Shaw, hereby appeals from said order and from the whole and every part thereof to the Supreme Court of the United States and hereby prays that this appeal may now be allowed and that a citation may be issued accordingly and that a transcript of the record, papers and proceedings upon which said order was made, duly authenticated, may be sent to the Supreme Court of the United States and that said order may be reversed with costs, and for such other and further relief as may be meet and just.

And so the complainant will every pray, etc.

HIRSCH, SCHEUERMAN & LIMBURG,
Solicitors for Plaintiff-Appellant, 160 *Broadway, New York City.*

And now, to-wit, on the 27th day of April, 1914, it is
Ordered that the above appeal be allowed as prayed for.

H. G. WARD, *C. J.*

47 (Endorsed:) U. S. Circuit Court of Appeals for the Second Circuit. William M. Fleitmann, Suing on Behalf of Himself,

&c., Pl'ff-appellant against United Gas Improvement Co. et al., Def'ts-respondents. (Arthur E. Shaw). Petition for appeal and order allowing same. Hirsch, Schuerman & Limburg, Attorneys for Appellant, 160 Broadway, Borough of Manhattan, New York City, N. Y. Copy this day received. Apr. 30, 1914. Hatch & Sheehan, Att'ys for Def't-Resp'd't Shaw. United States Circuit Court of Appeals, Second Circuit. Filed May 1, 1914. William Parkin, Clerk.

48 United States Circuit Court of Appeals for the Second Circuit.

WILLIAM M. FLEITMANN, Suing on Behalf of Himself and All Other Stockholders of The Consolidated Street Lighting Company Who Shall Elect to Come in and Contribute to the Expense of the Action, Plaintiff-Appellant,

against

UNITED GAS IMPROVEMENT COMPANY, THE UNITED LIGHTING & Heating Company, The Welsbach Street Lighting Company of America, The Consolidated Street Lighting Company, William Findlay Brown, Arthur E. Shaw, Randall Morgan, Samuel T. Bodine, and Thomas Dolan, Defendants-Respondents.

Assignment of Errors.

Now comes the complainant William M. Fleitmann above named, suing on behalf of himself and all other stockholders of The Consolidated Street Lighting Company who shall elect to come in and contribute to the expense of the action, by his solicitors, and presents the accompanying petition for appeal from the order herein dated the 27th day of January, 1914, and files the following assignments of error, and submits that the United States Circuit Court of Appeals for the Second Circuit and the Honorable Judges thereof who made said order affirming the decree of the District Court of the United States for the Southern District of New York dismissing this suit as against the defendant Arthur E. Shaw erred in the following particulars, to-wit:

49 First. In that the United States Circuit Court of Appeals for the Second Circuit and the District Court of the United States for the Southern District of New York found and held that a suit in equity, by a minority shareholder of a corporation (the Consolidated Street Lighting Company) who is suing on behalf of himself and all other shareholders of that corporation who shall elect to come in and contribute to the expense of the action, charging defendants (other than said corporation) with acts in violation of the provisions of Section 7 of the Act of Congress approved July 2nd, 1890 (26 Statutes at Large 209, Chap. 647, U. S. Compiled Statutes 1901, p. 3200) which resulted in injury and damage to said corporation and that the said corporation had refused to begin an action to recover for such damages under said statute in its own behalf after demand therefor had been duly made by said shareholder, will not lie to secure a judgment decreeing that such de-

fendants (other than the said corporation) shall pay over to the said corporation damages for such violations and injury.

Second. In that the United States Circuit Court of Appeals for the Second Circuit and the District Court of the United States for the Southern District of New York found and held that a suit in equity, by a minority shareholder of a corporation (the Consolidated Street Lighting Company) who is suing on behalf of himself and all other shareholders of that corporation who shall elect to come in and contribute to the expense of the action, charging defendants (other than said corporation) with acts in violation of the provisions of Section 7 of the Act of Congress approved July
50 2nd, 1890 (26 Statutes at Large 209, Chap. 647, U. S. Compiled Statutes 1901, p. 3200) which resulted in injury and damage to said corporation and that the said corporation had refused to begin an action to recover for such damages under said statute in its own behalf after demand therefor had been duly made by said shareholder, will not lie to secure a judgment decreeing that such defendants (other than said corporation) shall pay over to the said corporation three fold damages for such violations and injury.

Third. In that the United States Circuit Court of Appeals for the Second Circuit and the District Court of the United States for the Southern District of New York found and held that a suit in equity, by a minority shareholder of a corporation (the Consolidated Street Lighting Company) who is suing on behalf of himself and all other shareholders of that corporation who shall elect to come in and contribute to the expense of the action, charging defendants (other than said corporation) with acts in violation of the provisions of Section 7 of the Act of Congress approved July 2nd, 1890 (26 Statutes at Large 209, Chap. 647, U. S. Compiled Statutes 1901, p. 3200) which resulted in injury and damage to said corporation and that the said corporation had refused to begin an action to recover for such damages under said statute in its own behalf after demand therefor had been duly made by said shareholder, will not lie to secure a judgment decreeing that said corporation shall institute an action at law against the defendants (other than the said corporation) to recover damages for such violations and injury.

51 Fourth. In that the United States Circuit Court of Appeals for the Second Circuit and the District Court of the United States for the Southern District of New York found and held in a suit brought by a minority shareholder of a corporation (the Consolidated Street Lighting Company) suing on behalf of himself and all other shareholders of that corporation who shall elect to come in and contribute to the expense of the action, charging defendants (other than said corporation) with acts in violation of the provisions of Section 7 of the Act of Congress approved July 2nd, 1890 (26 Statutes at Large 209, Chap. 647, U. S. Compiled Statutes 1901, p. 3200) which resulted in injury and damage to said corporation and after the said corporation had refused to begin an action to recover for such damages under said statute in its

own behalf after demand therefor had been made by the complainant, that the bill of complaint did not warrant such a construction as would permit the court to decree that the corporation shall sue the defendants (other than said corporation) for compensatory or treble damages under said statute for such violations and injury.

Fifth. In that the United States Circuit Court of Appeals for the Second Circuit and the District Court of the United States for the Southern District of New York found and held that an equity suit cannot be maintained by a single stockholder of a corporation under the provisions of Section 7 of the Act of Congress approved July 2nd, 1890 (26 Statutes at Large 209, Chap. 647 U. S. Compiled Statutes 1901, p. 3200) to recover three-fold damages for injuries sustained by the corporation.

52 Sixth. In that the United States Circuit Court of Appeals for the Second Circuit and the District Court of the United States for the Southern District of New York found and held that an equity suit cannot be maintained under the provisions of Section 7 of the Act of Congress approved July 2nd, 1890 (26 Statutes at Large 209, Chap. 647 U. S. Compiled Statutes of 1901, p. 3200) by a single stockholder suing on behalf of himself and all other stockholders of a corporation similarly situated who shall elect to come in and contribute to the expense of the action to recover three-fold damages on behalf of the corporation for injuries sustained by the corporation.

Seventh. In that the United States Circuit Court of Appeals for the Second Circuit and the District Court of the United States for the Southern District of New York found and held that the bill of complaint herein does not set forth a good cause of action in equity.

Eighth. In that the United States Circuit Court of Appeals for the Second Circuit and the District Court of the United States for the Southern District of New York found and held that the plaintiff's bill filed in this case be dismissed as to the defendant Arthur E. Shaw.

Ninth. In that the United States Circuit Court of Appeals for the Second Circuit affirmed the decree of the United States District Court for the Southern District of New York entered in the office of the Clerk of said Court on the 14th day of April, 1913, granting the motion of the defendant Arthur E. Shaw to dismiss the bill of complaint and dismissing the same as against said defendant.

53 Tenth. In that the United States Circuit Court of Appeals for the Second Circuit ordered that the said decree of the United States District Court for the Southern District of New York be affirmed with costs.

Wherefore the complainant prays that the said order may be reversed and that the said United States Circuit Court of Appeals for the Second Circuit and the District Court of the United States for the Southern District of New York be directed by the mandate of the United States Supreme Court to enter an order and decree vacating and reversing the said order and decree heretofore rendered herein with costs to complainant, and complainant further

prays for such other or further relief as shall seem just in the premises.

Dated New York, April 24th, 1914.

HIRSCH, SCHEUERMAN & LIMBURG,
Solicitors for Complainant.

160 Broadway, Manhattan, New York City.

54 (Endorsed:) U. S. Circuit Court of Appeals for the Second Circuit. William M. Fleitmann suing on behalf of himself &c. Pl'ff-appellant vs. United Gas Improvement Co. et al., Def'ts-respondents. (Arthur E. Shaw). Assignment of errors. Hirsch, Scheuerman & Limburg. Attorneys for Appellant, 160 Broadway, Borough of Manhattan, New York City, N. Y. Copy this day received. Apr. 30, 1914. Hatch & Sheehan, Att'ys for def't-resp'd't Shaw. United States Circuit Court of Appeals, Second Circuit. Filed May 1, 1914. William Parkin, Clerk.

55 Know all men by these presents, that the United States Fidelity and Guaranty Company having an office and usual place of business at No. 47 Cedar Street, Borough of Manhattan, City, County and State of New York, is held and firmly bound unto Arthur E. Shaw in the full and just sum of five hundred ($500.00) dollars, to be paid to the said Arthur E. Shaw, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, it binds itself, its successors and assigns, firmly by these presents.

Sealed with its seal and dated the 24th day of April, 1914.

Whereas, lately at a term of the United States Circuit Court of Appeals for the Second Circuit, in a suit depending in said Court between William M. Fleitmann, suing on behalf of himself and all other stockholders of The Consolidated Street Lighting Company who shall elect to come in and contribute to the expense of the action, plaintiff-appellant, and United Gas Improvement Company, The United Lighting & Heating Company, The Welsbach Street Lighting Company of America, The Consolidated Street Lighting Company, William Findlay Brown, Arthur E. Shaw, Randall Morgan, Samuel T. Bodine and Thomas Dolan, defendants-respondents, an order was entered bearing date the 27th day of January, 1914, affirming the decree of the District Court of the United States for the Southern District of New York entered in the office of the Clerk of said Court on the 15th day of April, 1913, dismissing the bill in said action as to the defendant Arthur E. Shaw, and the said William M. Fleitmann, suing on behalf of himself and all other stockholders of The Consolidated Street Lighting Company, etc., having obtained an order allowing an appeal from said order and having filed a copy thereof in the Clerk's Office of the said Court to reverse the order in the aforesaid suit, and a citation directed to the said Arthur
56 E. Shaw and others, citing and admonishing them to be and appear at the Supreme Court of the United States, at Washington, within — days from the date thereof.

Now, therefore, the condition of the above obligation is such that if the said William M. Fleitmann, suing on behalf of himself and all other stockholders of The Consolidated Street Lighting Company, etc., shall prosecute his appeal to effect, and answer all damages and costs if he fails to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

Signed and Delivered in Presence of:—

UNITED STATES FIDELITY & GUARANTY CO.,

[SEAL.] By S. FRANK HEDGES, [L. S.]
Attorney in Fact.

Attest:

WILLIAM H. ESTWICK, [L. S.]
Attorney in Fact.

57 *Affidavit, Acknowledgment and Justification by the United States Fidelity and Guaranty Company.*

[Vignette.]

STATE OF NEW YORK,
County of New York, ss:

Before me personally came S. Frank Hedges known to me to be Attorney in Fact of the United States Fidelity and Guaranty Company, the corporation described in and which executed the annexed bond of Arthur E. Shaw as surety thereon, who being by me duly sworn, deposes and says that he resides in the City of New York, State of New York, and that he is the Attorney in Fact of the said United States Fidelity and Guaranty Company, and knows the corporate seal thereof; that said Company is duly and legally incorporated under the laws of the State of Maryland; that said Company has complied with the provisions of the Act of Congress of August 13, 1894, allowing certain corporations to be accepted as surety on bonds; that the seal affixed to the annexed bond of Arthur E. Shaw is the corporate seal of the said United States Fidelity and Guaranty Company, and was thereto affixed by order and authority of the Board of Directors of said Company; and that he signed his name thereto by like order and authority as Attorney in Fact of said Company; and that he is acquainted with William H. Estwick and knows him to be Attorney-in-fact of said Company; and that the signature of said William H. Estwick subscribed to said bond is the genuine handwriting of said William H. Estwick and was thereto subscribed by order and authority of said Board of Directors, and in the presence of said deponent; and that the assets of said Company, unencumbered and liable to execution, exceed its claims, debts and liabilities, of every nature whatsoever, by more than the sum of two million dollars ($2,000,000.00).

S. FRANK HEDGES.

Sworn to, acknowledged before me, and subscribed in my presence this 24 day of Apr. 1914.

ALBERT J. ROWLAND,
Notary Public, New York County, No. 3818; *Registers No.* 6115; *Certificates Filed in Kings Registers No.* 6060, *Bronx No.* 10, *Registers No.* 632, *Queens, Richmond, Westchester, Nassau, Putnam, Orange, and Suffolk Counties.*

Term Expires Mar. 30, 1916.

58 (Endorsed:) United States Circuit Court of Appeals for the Second Circuit. William M. Fleitmann, suing on behalf of himself and all othe- stockholders of The Consolidat- Lighting Company, et al., Plaintiff-Appellant, against Arthur E. Shaw, et al., Defendants-respondents. (Shaw Appeal). Undertaking on Appeal. Copy this day received. Apr. 30, 1914. Hatch & Sheehan, Att'ys for def't-resp'd't Shaw. The within undertaking is approved as to form and as to the sufficiency of the surety. H. G. Ward. United States Fidelity and Guaranty Co., 47 Cedar Street, New York City. Surety. United States Circuit Court of Appeals, Second Circuit. Filed May 1, 1914. William Parkin, Clerk.

59 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby Certify that the foregoing pages, numbered from 1 to 58 inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of William M. Fleitmann against United Gas Improvement Company et al. (Shaw Appeal) as the same remain of record and on file in my office.

In Testimony Whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 4th day of May in the year of our Lord One Thousand Nine Hundred and fourteen and of the Independence of the said United States the One Hundred and thirty-eighth.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN, *Clerk.*

60 By the Honorable, one of the Judges of the United States Circuit Court of Appeals for the Second Circuit, to Arthur E. Shaw, Greeting:

You are hereby cited and admonished to be and appear before a Supreme Court of the United States at Washington, in the District of Columbia, on the 23rd day of May, 1914, pursuant to an appeal filed in the Clerk's office of the United States Circuit Court of Appeals for the Second Circuit, wherein William M. Fleitmann, suing

on behalf of himself and all other stockholders of the Consolidated Street Lighting Company who shall elect to come in and contribute to the expense of the action is appellant and you are appellee, to show cause, if any there be, why the decree in said appeal mentioned should not be corrected and speedy justice should not be done in that behalf.

Given under my hand at the Borough of Manhattan, in the City of New York, in the Circuit above mentioned, this 27th day of April, in the year of our Lord one thousand nine hundred and fourteen and of the independence of the United States the one hundred and thirty-eighth.

H. G. WARD,
Judge of the United States Circuit Court of Appeals for the Second Circuit.

61 [Endorsed:] United States Circuit Court of Appeals, Second Circuit. William M. Fleitmann, plaintiff-appellant, vs. United Gas Improvement Company et al., defendants-respondents. (Shaw Appeal.) Original citation. Hirsch, Schuerman & Limburg, Attorneys for appellant, 160 Broadway, Borough of Manhattan, New York City, N. Y. Service of a copy of the within is hereby admitted. Dated Apr. 30, 1914. —— ——, att'ys for def't-resp'd't Shaw. Copy this day received. Apr. 30, 1914. Hatch & Sheehan. Filed May 1, 1914. William Parkin, clerk United States Circuit Court of Appeals, Second Circuit.

Endorsed on cover: File No. 24,207. U. S. Circuit Court Appeals, 2d Circuit. Term No. 146. William F. Fleitmann, suing on behalf of himself and all other stockholders of The Consolidated Street Lighting Company who shall elect to come in and contribute to the expense of the action, appellant, vs. Arthur E. Shaw. Filed May 9th, 1914. File No. 24,207.

Supreme Court of the United States

THE WELSBACH STREET LIGHTING COMPANY OF AMERICA,

Defendant-Appellee,

Impleaded with

UNITED GAS IMPROVEMENT COMPANY *et al.*,

Co-defendants.

OCTOBER TERM, 1915.

No. 145.

THE SAME,

Complainant-Appellant,

vs.

ARTHUR E. SHAW,

Defendant-Appellee,

Impleaded with

UNITED GAS IMPROVEMENT COMPANY *et al.*,

Co-defendants.

OCTOBER TERM, 1915.

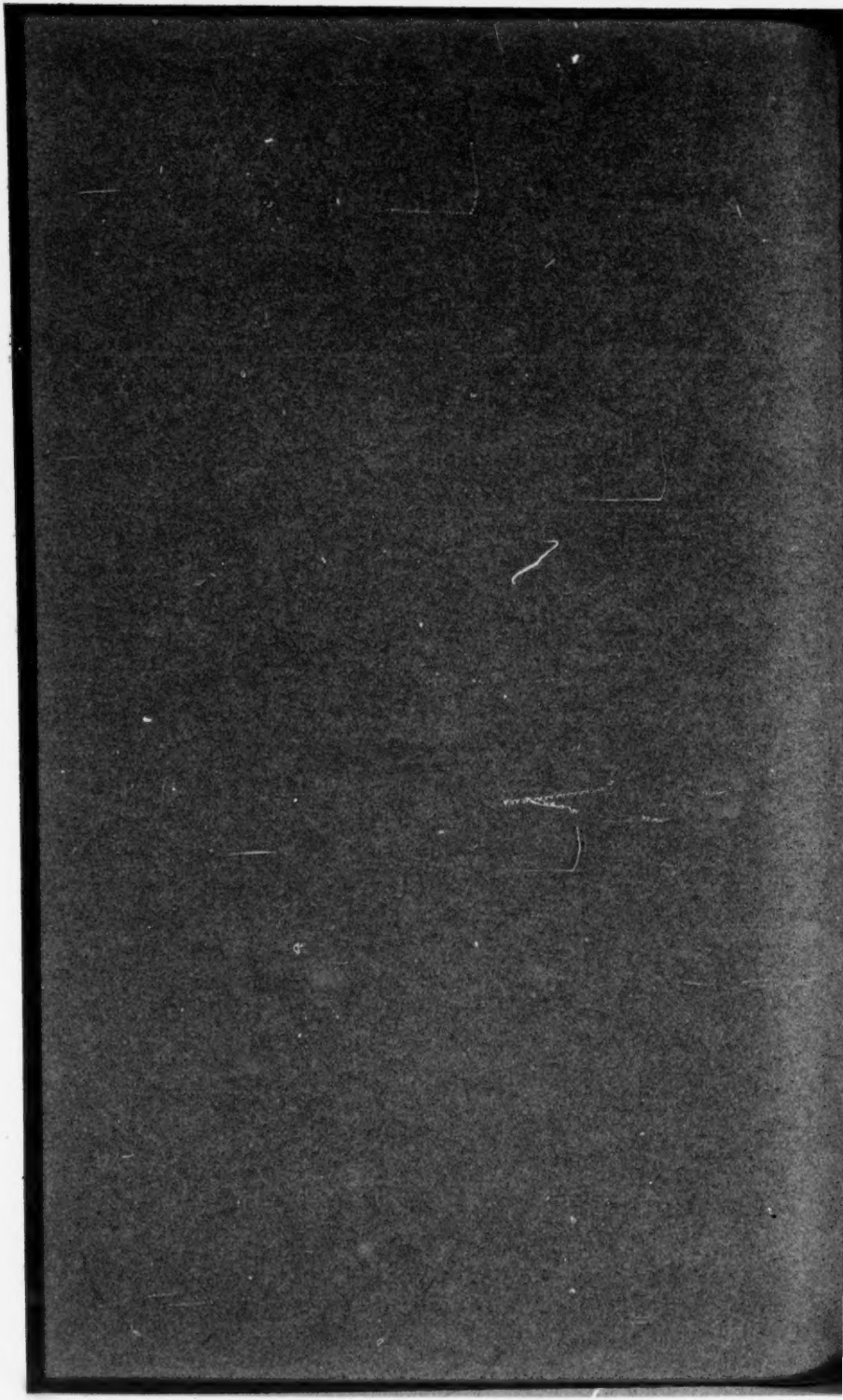
No. 146.

BRIEF FOR COMPLAINANT-APPELLANT

HENRY A. WISE,
Counsel for Complainant-Appellant.

HENRY L. SCHEUERMAN,
HARRY F. MELA,
of the New York Bar,
on the Brief.

HIRSCH, SCHEUERMAN & LIMBURG,
Solicitors for Complainant-Appellant,
No. 160 Broadway,
New York City, N. Y.



Supreme Court of the United States

WILLIAM M. FLEITMANN, suing on behalf of himself and all other stockholders of the Consolidated Street Lighting Company who shall elect to come in and contribute to the expense of the action, Complainant-Appellant, vs. THE WELSBACH STREET LIGHTING COMPANY OF AMERICA, Defendant-Appellee, impleaded with UNITED GAS IMPROVEMENT COMPANY, THE UNITED LIGHTING & HEATING COMPANY, THE CONSOLIDATED STREET LIGHTING COMPANY, WILLIAM FINDLAY BROWN, ARTHUR E. SHAW, RANDALL MORGAN, SAMUEL T. BODINE and THOMAS DOLAN, Co-defendants.	October Term, 1915. No. 145.
THE SAME, Complainant-Appellant, against ARTHUR E. SHAW, Defendant-Appellee, impleaded with UNITED GAS IMPROVEMENT COMPANY, THE UNITED LIGHTING & HEATING COMPANY, THE WELSBACH STREET LIGHTING COMPANY OF AMERICA, THE CONSOLIDATED STREET LIGHTING COMPANY, WILLIAM FINDLAY BROWN, RANDALL MORGAN, SAMUEL T. BODINE and THOMAS DOLAN, Co-defendants.	October Term, 1915. No. 146.

BRIEF FOR COMPLAINANT-APPELLANT.

APPEALS FROM TWO DECREES OF THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, EACH

AFFIRMING DECREE OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DISMISSING THE BILL OF COMPLAINT AS AGAINST DEFENDANT THE WELSBACH STREET LIGHTING COMPANY OF AMERICA AND DEFENDANT ARTHUR E. SHAW, RESPECTIVELY, FOR POINTS OF LAW APPEARING UPON THE FACE OF THE BILL.

Summary Statement of the Case.

Plaintiff sues on behalf of himself and all other stockholders of the Consolidated Street Lighting Company (which we shall hereinafter term the "Consolidated Company") (p. 1).*

His bill of complaint (pp. 1-9), so far as material to the question involved on this appeal, alleges as follows: That the Consolidated Company was organized in 1906 and entered into the business of municipal lighting and the furnishing of street lamps and other lighting accessories (pp. 1-2). That plaintiff was a minority stockholder therein, owning 1,011 shares out of its total authorized capital of 10,000 shares (p. 2). That the Consolidated Company was independent, and by its own organization, as well as through a subsidiary company, was in active competition with the other corporate defendants (p. 2), and all were engaged in interstate commerce (p. 4). That said corporate defendants (other than the Consolidated Company) and the individual defendants formed a conspiracy to monopolize the aforesaid line of business throughout the United States and force the Consolidated Company out of business, in violation of the

*All references in this brief are to pages of the printed copies of the transcript of record in No. 145; *not* to the paging of the original transcript.

Sherman Anti-Trust Law (pp. 3, 4, 5). That to accomplish that purpose the conspirators, concealing their identity behind an agent, acquired control of the majority stock of the Consolidated Company through certain fraudulent acts set forth in the bill (pp. 5-6), and by means of such stock control filled the directorate and offices of the Consolidated Company with their own nominees (p. 6). That then these conspirators deliberately encompassed the ruin of the Consolidated Company through divers means set forth in detail in the bill (pp. 6-7), to the damage *of the Consolidated Company* in the sum of $1,000,000 (p. 8). The bill alleges diversity of citizenship (p. 1), lack of collusion on plaintiff's part, plaintiff's demand on the Consolidated Company to sue the other defendants, and its refusal to do so, and alleges that even if such suit were brought it would not be prosecuted in good faith because said company is under the control of the conspiring defendants (p. 8).

The prayer of the bill is that the defendants other than the Consolidated Company—*i. e.*, the conspiring defendants—be decreed to pay to the Consolidated Company threefold damages due by reason of the said acts violative of the statute, to wit: $3,000,000 (p. 9).

The defendant Welsbach Street Lighting Company of America (one of the conspiring defendants) filed a motion to dismiss the bill under Equity Rule 29 for points of law appearing on the face thereof, viz.: (1) want of equity, (2) lack of jurisdiction in equity, and (3) non-compliance with Equity Rule 27 (formerly Rule 94) (p. 10).

In the District Court Judge COXE sustained that defendant's motion stating that an equity suit is not maintainable upon the facts set forth in the bill by any private person (p. 12), and that a suit at law to recover threefold damages cannot be

maintained by a minority stockholder (p. 13)—in other words, that the plaintiff, being a minority shareholder, is remediless. As will be pointed out in the argument, the learned Judge appears to have misapprehended the nature of the relief sought by plaintiff. His decree directed a dismissal of the bill as against the moving defendant expressly "on the ground that an equity suit cannot be maintained under Section 7 of the Anti-Trust Act by a single stockholder to recover threefold damages for injuries sustained by his corporation" (p. 14).

An identical motion was presented by defendant Shaw, the same disposition made thereof, and similar decree entered. This appears in the transcript of record in No. 146. (The two records are identical, except for the name of the defendant-appellee and except for the page numbering.)

Complainant appealed from both decrees to the Circuit Court of Appeals for the Second Circuit (pp. 14-15), which affirmed on the grounds set forth in the opinion of Judge COXE as well as upon the further ground that the Court found no precedent for the action (pp. 21-22). A further appeal was thereupon taken to this Court (p. 23).

Specification of Errors Relied Upon.

The error on the record consists of the adjudication that the bill of complaint does not set forth a good cause of action in equity (Seventh Assignment, p. 26) and the dismissal of the bill on that ground (Eighth and Ninth Assignments, p. 26). More specifically, it lies in the ruling of the lower Courts that upon the facts alleged by the complainant herein a minority stockholder in an aggrieved corporation may not, after demand upon the corporation to begin suit and its refusal so to do, maintain a stockholder's suit to compel the wrong-

doing defendants to pay to the said aggrieved corporation (which is also joined as a defendant) threefold damages under Section 7 of the Sherman Law (First and Second Assignments, pp. 24-25). Further error is alleged upon the failure of the Court to rule that the bill authorized a decree, under the prayer for general relief, that the Consolidated Company should begin an action at law against the wrongdoing defendants (Third and Fourth Assignments, pp. 25-26).

Points of Law Presented by Appellant.

Plaintiff demands no injunction to restrain violations of the Anti-Trust Law, and concedes that such an injunction under the provisions of the Act of 1890, which were in force when this suit was commenced, could be issued only at the suit of the Government (*Minnesota* v. *Northern Securities Co.* [1904], 194 U. S., 48, 71). Plaintiff does not demand the payment of any money damages to himself, and concedes that for the wrongs done to the defendant Consolidated Company by the conspiring defendants the right of action at law resides solely in that corporation and not in any of its stockholders (*Loeb* v. *Eastman Kodak Co.* [1910], 183 Fed., 704; *Converse* v. *United Shoe Mach. Co.* [1904], 185 Mass., 422). Therefore plaintiff, having attempted to procure the institution of such action at law by the Consolidated Company against the other defendants, having done all that was required in that behalf by Equity Rule 27, and having failed, now brings this *derivative action*, wherein he sues *in the right of said Consolidated Company* and prays judgment that the other defendants pay damages not to him but *to the Consolidated Company.*

It is elementary that whenever a right of action exists in favor of a corporation and the latter, by

reason of its being under the control of the very parties against whom the right of action exists, fails and refuses to enforce it, any stockholder, upon the failure of his *bona fide* attempts to procure corporate action or upon his showing that corporate action if taken would not be prosecuted in good faith, may maintain a suit in equity to secure redress *to the corporation* (*Dodge* v. *Woolsey* [1855], 18 How., 331; *Hawes* v. *Oakland* [1881], 104 U. S., 450; *Delaware & Hudson Co.* v. *Albany & Sus. R. Co.* [1909], 213 U. S., 435).

Is there, however, any valid reason for denying the application of that rule to a case where the cause of action in favor of the corporation arises under the Sherman Anti-Trust law and thus making such a case an exception to the general rule?

(1) *Is there any reason based on the letter of the statute?*

Section 4 of the Anti-Trust Act of 1890 (26 St. 209, c. 647, approved July 2, 1890) authorizes "proceedings in equity" to *restrain* violations of the statute, to be brought by the Government. Section 7 declares that any person injured by violations of the statute "may sue therefor * * * and *shall recover* threefold the damages by him sustained." Nothing is said as to how this is to be tried. The word "jury" appears nowhere. The statute is silent as to how the threefold damages are to be recovered. Nothing is said as to the form of action in those States where common law pleading survives, nor as to rules of evidence or statute of limitations, nor as to survival of the right of action to personal representatives or its devolution to receivers or to trustees for creditors. The Act merely provides in general terms for a right of action for certain wrongs. That right of action, unless expressly

limited by the statute itself, must therefore be deemed to possess the usual attributes of rights of action in general. Obviously Congress intended that the method of recovery should be in accordance with our existing system of jurisprudence and in the appropriate forum, namely, that if the action for damages be brought by the injured party it should be at common law, where all actions for damages are triable, but that if it were a stockholder's derivative action, which became necessary by reason of the acts of the conspiring defendants or for any other reason, so that there was no adequate remedy at law, resort might be had to a court of equity, just as in any other situation where there is no adequate remedy at law available to the damaged litigant.

(2) *Is there any reason based on precedent?*

The learned District Court said in its opinion that only the Government has the right to sue *in equity* under the Anti-Trust Act. If the learned Judge had said that only the Government has the right to sue *for an injunction*, the statement would have been correct, for the cases cited in his opinion (p. 12), as well as others in the Federal courts, *all* hold that an individual has under the Anti-Trust Act no right to an *injunction to restrain violations* of the law, but must confine himself to his remedy by way of damages, but *none* of the cited cases holds that where the corporation, having a right of action for damages under the statute, refuses to sue and enforce its right of action, resort may not be had to *equity* by a minority stockholder to the end that the wrongdoers may be compelled to respond in damages.

The learned Circuit Court of Appeals seems to have been impressed by the absence of direct and

explicit adjudicated cases expressly authorizing this action (p. 21). The question has not heretofore, so far as we are aware, been presented to this Court. If there be no precedent, the Court can and ought to make one now.

(3) *Is there any reason based upon the general principles underlying stockholders' suits?*

It has always been the rule in equity that if a trustee were delinquent in his duties and failed to bring a proper action for the benefit of the trust estate, the *cestui que trust* might, after demand upon the trustee to sue and the latter's refusal, bring the suit himself, joining the trustee as a co-defendant, and of course such suit must needs be in equity, because at law only the trustee, who has the legal title to the claim, would have any standing as a plaintiff (*Alexander* v. *R. Co.* [1874], 3 Dill., 487; *Morgan* v. *Ry. Co.* [1882], 21 Blatchf., 134, 15 Fed., 55). Equity regards the relationship between a corporation and its own stockholders, or between the majority stockholders and the minority, as that of trustee and beneficiary (*Ervin* v. *Oregon etc. Co.* [1886], 27 Fed., 625, and cases cited at 630-632; *Backus* v. *Brooks* [1912], 195 Fed., 452; *Farmers' Loan & Tr. Co.* v. *R. R. Co.* [1896], 150 N. Y., 410). Accordingly, if the corporation (the trustee) fails to enforce a right existing in its own favor, equity, to prevent a fraud upon the minority stockholders, permits the latter (the *cestuis que trust*) to maintain a suit based upon the corporation's cause of action (*Dodge* v. *Woolsey* [1855], 18 How., 331; *Kavanaugh* v. *Trust Co.* [1905], 181 N. Y., 121). There is no element in these principles of equity jurisprudence, so far as we can see, that should forfend against their application to the state of facts set forth in the bill of complaint herein.

(4) *Is there any reason based on the circumstance that the right of action in favor of the corporation is one at common law for money damages?*

This is sufficiently answered by the principles above set forth, as well as by the precedent of *Aetna Ins. Co.* v. *Albany & Susquehanna R. R. Co. and Delaware & Hudson Co.* [1907], 156 Fed., 132, aff'd on opinion below [1909], 170 Fed., 1019; cert. den. *sub nom. D. & H. Co.* v. *Albany & Sus. R. Co.* [1909], 215 U. S., 601. In that case, defendant Delaware & Hudson Co. owed money to defendant Albany & Susquehanna Co. as rent under a written lease. The Delaware & Hudson Co. was in control of the Albany & Susquehanna Co. and declined to sue for the rent. The Aetna Insurance Company, a minority stockholder of the Albany & Susquehanna, brought suit in equity to require the defendant Delaware & Hudson Co. to pay the rent moneys to the defendant Albany & Susquehanna Co., and after a hearing in equity a decree was made accordingly, which was affirmed on appeal.

It was, however, urged herein in the courts below that defendants herein were entitled to a jury trial (see pp. 21-22). It is sufficient answer, however, to say that neither the statute nor any principle of law gives a party the right to a jury trial in such a case as that made by the bill of complaint herein, which is in equity. If plaintiff has a cause of action it is triable by the Court without a jury, and to say that defendants are entitled to a jury trial and that therefore plaintiff has no cause of action is begging the question. Defendants must abide by the consequences of their own acts. They have fraudulently acquired control of the Consolidated Company, as part and parcel of their monopolistic conspiracy, with the result that they are immune from any suit at law on the

part of the injured corporation. Concededly, plaintiff and the other minority stockholders have no remedy against these conspirators in a court of common law. Therefore, the wrongdoers must needs be sued on the equity side of the court, where they have no constitutional or express statutory right to a jury trial.

(5) *Is there any reason based on the circumstance that the right of the corporation is a statutory cause of action?*

No reason is offered for drawing any such distinction. In the case of *Dodge* v. *Woolsey* [1855], 18 How., 331, the right of the corporation, which the stockholder was permitted to enforce, was a right existing neither at common law nor under the equity jurisprudence, but solely under the terms of the Federal Constitution. If a stockholder can enforce a common law right or a constitutional right which exists in favor of his corporation, there would appear to be no reason for denying him the power to enforce a statutory right.

(6) *Is there any reason based on expediency?*

The learned Judges below, erroneously believing the cases to hold that only the Government can sue *in equity* (whereas all they really decide is that only the Government can sue for *an injunction*), fortified their conclusion by suggesting that if the right to maintain a bill in equity such as that herein were given to minority stockholders, it would be a dangerous power to put into the hands of individuals (p. 13). This wholly overlooks the reasoning of this Court in *Minnesota* v. *Northern Securities Co.* [1904], 194 U. S., 48, at 70-71, wherein it is pointed out that Congress, for reasons suggested in Mr. Justice HARLAN'S opinion, limited the

right to an *injunction* to suits brought by the *Government*, so as to avoid disturbance of interstate and foreign commerce at the instance of private parties, and left to *individuals* the recovery of *money damages* as their only relief. In the suit at bar *no injunction* is asked for, so that this objection does not apply, for there could be no disturbance of commerce at the instance of an individual. The result of plaintiff's success in the suit would be the assessment of damages and their equitable distribution. To argue, as did defendants' counsel below, that the power in a single stockholder to recover threefold damages for his corporation would be "drastic" and an "extraordinary remedy" and a "tremendous power" (p. 13), is equivalent to saying that Section 7 of the Act of Congress is a dangerous statute. What reason can there be for granting that power to all private corporations, to the majority stockholders who control the conduct of corporations, to partnerships and indeed to individual manufacturers and traders, whilst denying it to aggrieved minority shareholders? The same reasoning would deprive individual stockholders of the right to maintain all derivative actions.

The argument that there is danger of unfounded suits, if well founded at all, ought to be addressed to the legislative branch of the Government. However, there is far more danger in suffering wrongs to go without redress than in the possibility of unscrupulous persons bringing unfounded suits, and experience has shown that not only are stockholders' suits a valuable remedy for wrongs committed, but that the possibility of their being brought is often an effective deterrent against fraud and oppression.

If this action is not maintainable—if plaintiff be without remedy—then a safe method has been dis-

covered whereby violators of the Anti-Trust statute may with impunity throttle a competing corporation and wreck its independent business by securing control of a majority of its stock and thus deprive the minority shareholders of their property by methods leaving them no redress. The object of the statute was to provide a right of action for such injuries, which did not exist at common law (*Addyston Pipe & Steel Case* [1898], 85 Fed., 271; [1899] 175 U. S., 211). It was designed to promote commerce and to protect those who may have invested their capital in commercial enterprises from being oppressed and despoiled by unlawful combinations in violation of the Act. The appellees seek such a construction of the Act as would defeat the intent of Congress and the object of the legislation.

The decrees of the Circuit Court of Appeals should be reversed.

Dated, New York, N. Y., November 24, 1915.

Respectfully submitted,

HENRY A. WISE,
Counsel for Complainant-Appellant.

HENRY L. SCHEUERMAN,
HARRY F. MELA,
of the New York Bar,
on the brief.

The Hecla Press, 57 Warren St., N. Y. Tel. 6280 Barclay.

FILED
DEC 18 1915
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Supreme Court of the United States

WILLIAM M. FLEITMANN, suing on behalf of himself and all other stockholders of the Consolidated Street Lighting Company who shall elect to come in and contribute to the expense of the action,

Complainant-Appellant,

vs.

THE WELSBACH STREET LIGHTING COMPANY OF AMERICA,

Defendant-Appellee,

impleaded with

UNITED GAS IMPROVEMENT COMPANY *et al.*,

Co-defendants.

OCTOBER TERM, 1915.
No. 145.

THE SAME,

Complainant-Appellant,

vs.

ARTHUR E. SHAW,

Defendant-Appellee,

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UNITED GAS IMPROVEMENT COMPANY *et al.*,

Co-defendants.

OCTOBER TERM, 1915.
No. 146.

REPLY BRIEF FOR COMPLAINANT-APPELLANT

HENRY A. WISE,
Counsel for Complainant-Appellant

HENRY L. SCHEUERMAN,
HARRY F. MELA,
of the New York Bar,

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October Term, 1915.
No. 146.

REPLY BRIEF FOR COMPLAINANT-APPELLANT.

We ask the Court's permission to file the following brief memorandum in reply to appellees' brief.

The suggestion that the Clayton Act (approved October 15, 1914) (38 U. S. Statutes, 730) may affect complainant's contention is in our view unsound. The right to seek injunctive relief under Section 4 of the Sherman Act, in our main brief, we were willing to concede may have been given solely to the Government. We realize, however, that there is excellent authority for the position that the Government's right to sue for an injunction is *exclusive* only in so far as the object is to restrain such violations of the Anti-Trust Act "as cause injury to the general public or to all alike," and that Section 4 does not prevent the individual having a property interest from obtaining an injunction against his individual loss and to preserve his individual property rights (*Bigelow* v. *Calumet & Hecla Mining Co.*, 155 Fed., 869, at p. 876; *Straus* v. *Am. Publishers Ass'n*, 231 U. S., 222; *Mannington* v. *Hocking Valley*, 183 Fed., 133).

Judge LURTON upon appeal of the *Bigelow* case (167 Fed., 721) to the Circuit Court of Appeals did not discuss the point here under review, but considered complainant's right to injunctive relief upon the merits, which, of course, would not have been necessary, had the Court been of the view that Section 4 forbade injunctive relief to the individual who sues, alleging a violation of the Sherman Act.

Our position is that, even conceding complainant would have no right to injunctive relief to restrain violations of the act, the statute does not forbid equitable relief for past violations, and that the same is true of the Clayton Act.

The Clayton Act disposes of whatever doubt there may have been with respect to the right to injunctive relief for violation of the Anti-Trust Act by expressly granting that right (Section 16)

to individuals threatened with loss or damage. Section 4 of the Clayton Act, however, is a substantial repetition of Section 7 of the Sherman Anti-Trust Act. Therefore, while under the Clayton Act the express right to equitable relief is granted to restrain acts which would cause prospective damage, that statute (like the Sherman Law) contains no limitation upon the right to proceed in equity to redress past wrongs occasioned by violations of the statute. Therefore, if the facts pleaded had arisen under the Clayton Act, the same question would remain for decision; and if the view of the Court below shall be sustained in this Court, those who may accomplish, by the means charged in the bill, the destruction of a minority shareholder's property by violation of that act will still be able to do so, absolved from all civil liability.

We answer appellee's contention (pp. 11 and 12 of appellee's brief) that the averment in the bill of complaint setting forth the case in compliance with Rule 27 of the Equity Rules is insufficient, by the recent case of *Delaware & Hudson Company* v. *Albany & Susquehanna*, 213 U. S., 435.

The appellees' contention (p. 14) that *Aetna Ins. Co.* v. *Albany & Susquehanna R. R.*, 156 Fed., 132 (cited at p. 9 of appellant's brief) is distinguishable because it turned out upon the trial, that the amount of the rent sued for in that case was uncertain as there were items to offset the amount of the rent—ignores the fact that the jurisdiction of the Court in equity in that case attached, because the rent was due, and the officers of the Susquehanna Company were unwilling to, and did not, enforce its payment; had the action been brought by the Susquehanna Company, instead of by the protesting minority shareholders it would have presented a common law action. We cited that case as being merely one instance out of a host of

cases, holding that where the acts of the directors are in violation of their trust in refusing to enforce the corporation's right of recovery—whether it exist at law or in equity—a derivative suit, as here, is maintainable in equity; the *equitable jurisdiction* attaches *not* by virtue of the character of the obligation which is to be enforced, but because of the officers' breach of trust and the failure of the corporation to sue in its own behalf—which leaves the minority shareholder without adequate legal remedy and entitles him to equitable relief.

December 10, 1915.

Respectfully submitted,

HENRY A. WISE,
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HENRY L. SCHEUERMAN,
HARRY F. MELA,
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Supreme Court of the United States.

WILLIAM M. FLEITMANN, suing on behalf of himself and all other stockholders of the Consolidated Street Lighting Company who shall elect to come in and contribute to the expense of the action,

Complainant-Appellant,

vs.

THE WELSBACH STREET LIGHTING COMPANY OF AMERICA,
Defendant-Appellee,

Impleaded with

UNITED GAS IMPROVEMENT COMPANY et al.,
Co-defendants.

OCTOBER TERM, 1915.
No. 145.

THE SAME,

Complainant-Appellant,

vs.

ARTHUR E. SHAW,

Defendant-Appellee,

Impleaded with

UNITED GAS IMPROVEMENT COMPANY et al.,
Co-defendants.

OCTOBER TERM, 1915.
No. 146.

BRIEF FOR DEFENDANTS-APPELLEES.

WILLIAM F. SHEEHAN,
Counsel for Defendants-Appellees.

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Supreme Court of the United States,

OCTOBER TERM 1915.

WILLIAM M. FLEITMANN, suing on behalf of himself and all other stockholders of the Consolidated Street Lighting Company who shall elect to come in and contribute to the expense of the action, Appellant, against THE WELSBACH STREET LIGHTING COMPANY OF AMERICA, Impleaded, etc., Appellee.	No. 145.
WILLIAM M. FLEITMANN, suing on behalf of himself and all other stockholders of the Consolidated Street Lighting Company who shall elect to come in and contribute to the expense of the action, Appellant, against ARTHUR E. SHAW, Impleaded, etc., Appellee.	No. 146.

APPEALS FROM DECREES OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AFFIRMING A DECREE OF THE DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DISMISSING THE BILL HEREIN AS TO EACH OF THE APPELLEES.

Statement.

As the appeals are in the same action, and the decrees from which the appeals are taken, the record and questions for review identical, except as to the names of the appellees, the appeals will be considered in one brief.

The question presented is whether when it appears that a number of individuals and corporations have entered into a combination and conspiracy to wreck a corporation, and have succeeded, a single minority stockholder of such corporation after the corporation and its officers have refused to act, can maintain a suit in equity against the conspirators to recover three-fold damages under Section 7 of the Anti-Trust Act.

The Cause of Action.

As appears by the title and is averred in the bill of complaint (fol. 2), the action is brought by the plaintiff as a stockholder of Consolidated Street Lighting Company, in behalf of himself and all others who shall come in and contribute to the expense of the action, and the bill is framed in equity, alleging (fol. 15) that prior to the commencement of the action he demanded of the corporation and its officers to institute proceedings and seek relief similar to that sought in this action, but that said corporation and its officers have neglected to take such action or to institute any proceeding.

Although the bill is framed in equity and the action is instituted on the equity side of the Court, the action was brought to recover treble damages under Section 7 of the Act of Congress approved July 2nd, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopoly," the plaintiff averring (Par. VII, fol. 5; Par. XI, fols. 8-9), that shortly after the organization of the defendant the Consolidated Street Lighting

Company, the other defendants realizing that said company would be a strong competitor in the municipal lighting business, individually and collectively and with other persons and companies whose names are unknown to the plaintiff, entered into, maintained and carried out a combination and conspiracy to control throughout the United States the business of securing contracts for municipal lighting and of supplying lamps and other lighting accessories, and in pursuance of said scheme and purpose wantonly, wrongfully, maliciously and unlawfully, and in violation of the provisions of the Act of Congress of July 2nd, 1890, and with intent to injure the property and business of the defendant Consolidated Street Lighting Company, combined, conspired, confederated and agreed together to restrain the defendant Consolidated Street Lighting Company from carrying on the municipal lighting business in the several states of the United States and to drive said company out of business as a competitor.

It is further averred (Par. XXIV, fol. 16) that as a result of the acts complained of Consolidated Street Lighting Company has been injured in its business and property to the amount of $1,000,000 and is entitled to recover by virtue of Section 7 of said Act of Congress three-fold the damages sustained.

The relief demanded is that the defendants other than the Consolidated Street Lighting Company may be decreed to pay over to the defendant Consolidated Street Lighting Company the sum of $3,000,000, pursuant to Section 7 of the Act of Congress hereinbefore mentioned (fol. 17).

Motion to Dismiss.

Motions were made by each of the appellees to dismiss the bill of complaint for points of law appearing upon the face of the bill, to wit: Insufficiency of fact to consti-

tute a valid cause of action in equity; that there is no jurisdiction in equity to grant the relief prayed by said bill against the defendant; that compliance has not been made in said bill with the requirements of Rule 27 of the Equity Rules of this Court, in that the bill fails to set forth with sufficient particularity the efforts of the plaintiff to secure such action as he desires on the part of the managing directors and of the shareholders of Consolidated Street Lighting Company, and the causes of his failure to obtain such action (fol. 19).

The bill of complaint was dismissed by Coxe, J., in the District Court as to each of the appellees, on the ground "that an equity suit cannot be maintained under Section 7 of the Anti-Trust Act by a single stockholder to recover three-fold damages for injuries sustained by his corporation" (fol. 27).

The decrees were affirmed on appeal by the Circuit Court of Appeals (fol. 43), and appeals therefrom to this Court were allowed (fol. 45).

Assignments of Error.

It appears from the appellant's brief (p. 4), that the assignments of error particularly relied upon are the first and second (fols. 49-50), that the court erred in holding that a minority stockholder in an aggrieved corporation may not, after demand upon the corporation to begin suit and its refusal so to do, maintain a stockholders' suit to compel the wrong doing defendants to pay to the aggrieved corporation (which is also joined as a defendant) three-fold damages under Section 7 of the Sherman Law; and the third and fourth assignments (fols. 50-51) that the courts below erred in refusing to decree that the bill of complaint authorizes a decree, under the prayer for general relief, that the aggrieved corporation should bring an action at law against the wrong doing defendants.

POINTS.

I.

The Courts below did not err in holding that the bill of complaint does not set forth a good cause of action in equity.

This suit, in express terms, is founded upon the Anti-Trust Act of 1890.

It is averred in the complaint (fol. 9) that the defendants (other than the Consolidated Street Lighting Company), individually and collectively with other persons and companies, whose names are unknown, in pursuance of a joint scheme and purpose to acquire control of the municipal lighting business, wantonly, wrongfully, maliciously and unlawfully" and " in violation of the provisions of the Act of Congress approved July 2nd, 1890 (26 Statutes at Large, 209, Chap. 647, U. S. Compiled Statutes 1901, p. 3200), and entitled 'An Act to protect trade and commerce against unlawful restraints and monopoly,' and with intent to injure the property and business of the defendant, the Consolidated Street Lighting Company, by means of acts done which are forbidden and declared to be unlawful by said act of Congress, combined, conspired, confederated and agreed together to restrain the defendant, the Consolidated Street Lighting Company from carrying on the municipal lighting business in the several states of the United States;" and again (fol. 16) "that the Consolidated Street Lighting Company has been injured in its business and property by reason of said combination and conspiracy, and the acts of the defendants done in pursuance thereof and to carry the same into effect which are declared to be unlawful by said Act of Con-

gress to the amount of $1,000,000 to recover three-fold which damages under Section 7 of said Act this suit is brought."

The demand for relief (fol. 17) is, "that the defendants, other than the Consolidated Street Lighting Company, may be decreed to pay over to the defendant, the Consolidated Street Lighting Company, the sum of $3,000,000, pursuant to Section 7 of the Act of Congress," etc., and for costs.

Section 7 of the Anti-Trust Act provides as follows:

> "Sec. 7. Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any circuit court of the United States in the district in which the defendant resides and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee."

But for this section no private person would have any standing in court, and the only right conferred by it is the right to sue for damages in a court of law.

> *Blindell vs. Hagen,* 54 Fed. 40 (C. C. E. D. La.);
> *Pidcock vs. Harrington et al.,* 64 Fed. 821 (C. C. S. D. N. Y.).

The suit authorized by Section 7 is not only at law, but the action is one in tort.

> *Metcalf vs. American School-Furniture Co.,* 108 Fed., 209 (C. C. W. D. N. Y.), aff'd. without opinion 113 Fed. 1020 (C. C. A. S. C.).

In the case cited, HAZEL, J., said:

> "Section 7 of the federal act of 1890 is declaratory of the common-law right which existed in favor of parties injured by wrongs enumerated in other sec-

> tions of that act, and confers jurisdiction to seek a remedy, and with treble damages, in the federal tribunal. The character of the right of action is in no way changed, and still remains one in tort."

Prior to the date of the Clayton Act (October 15, 1914, after this suit was commenced), it was decided in a number of cases that, except in cases involving general equity jurisdiction, a private person had no right to bring a bill in equity under the Anti-Trust Act, the Government being the only party who could obtain injunctive relief under its provisions.

> *Blindell vs. Hagan,* 54 Fed., 40;
> *Pidcock vs. Harrington,* 64 Fed., 821;
> *Southern Indiana Express Co. vs. United States Exp. Co.,* 88 Fed. 659; aff'd on opinion below 92 Fed. 1022;
> *Irving vs. Neal,* 209 Fed. 471, 477.

This rule has been changed by the Clayton Act, which provides (Section 16), that any person, firm, corporation or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the anti-trust laws when and under the same conditions as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings.

The statute in question creates both the liability and the remedy, and, therefore, the remedy provided is exclusive of all others.

> "A general liability created by statute without a remedy may be enforced by an appropriate common-law action. But where the provision for the liability is coupled with the provision for a special remedy, that remedy, and that alone, must be employed."

Pollard vs. Bailey, 87 U. S., 520, 527;
Greer, Mills & Co. vs. Stoller, 77 Fed. 1, 3 (C. C. W. D. Mo.).

In the opinion in the case last cited, the court said that Section 7 of the Anti-Trust Act gives to the private person injured in his business or property by any other person or corporation by reason of anything forbidden, or declared to be unlawful by the Act, a right to sue in a Circuit Court of the United States for threefold damages sustained by him, and that, "The statute, being highly penal in its character, must be strictly construed; and, having created a new offense, and imposed new liabilities, and having provided the modes of redress to the public and the private citizen, by established rules of construction, these remedies are exclusive of all others."

The District Court held and decided (fols. 24-25), that an equity suit cannot be maintained under Section 7 of the Anti-Trust Act by a single stockholder to recover threefold damages for injuries sustained by his corporation; that the complainant is an individual and this is such a suit; that an individual can sue only for threefold damages under the Act and this must be in a suit at law; that the complainant here is suing for threefold damages in a suit in equity; that the defendants are entitled to have the facts passed on by a jury.

The Circuit Court of Appeals in its *per curiam* opinion, concurred in the opinion below (fol. 42) and said, among other things:

> "We are clearly of the opinion that an act to recover treble damages under Section 7 of the Act must be an action at law, where defendants have the constitutional right to a jury trial. The sole relief prayed in these bills is that the defendants other than the Consolidated Company, be decreed to pay over to the Consolidated Company treble the damages it has

sustained by some violation of the Sherman Act. We find no authority which gives to a court of equity jurisdiction to make such a decree."

In the Circuit Court of Massachusetts (*Ames vs. New York Telephone & Telegraph Co., 166 Fed., 820*), a stockholder sought to maintain an action on the ground that he had been greatly injured in his business and property by the defendant corporation by his control of the stock of a corporation in which the plaintiff was a minority stockholder. It was held that the injury complained of was to the corporation and not to the stockholders of the corporation in which the plaintiff was interested, and that plaintiff could not, therefore, sue in his own name to recover treble damages under Section 7 of the Sherman Anti-Trust Act.

This case was followed in *Loeb vs. Eastman Kodak Company* (183 Fed. 704), (C. C. A. 3rd C. Pa.).

In an action brought in the District Court of Massachusetts by minority stockholders to recover damages under Section 7 against the corporation and other defendants, it was distinctly held, on demurrer to the bill of complaint, that minority stockholders cannot maintain a suit in equity under the Anti-Trust Act of July, 1890, to recover threefold damages in the right of the corporation for a violation of the act.

Corey vs. Independent Ice Co., 207 Fed. 459.

In an action at law by two stockholders of a corporation brought on behalf of themselves and all other stockholders of the company, averring that they had asked the defendant corporation to bring the suit and it had refused to do so, to recover treble damages under Section 7 of the Anti-Trust Act from certain individual and corporate defendants, on the ground of conspiracy to create a monopoly in the interstate commerce and trade in copper, de-

murrers were filed by defendants on the ground that the complaint did not state facts sufficient to constitute a cause of action.

The Circuit Court of Appeals, Second Circuit of New York, held that the cause of action was one conferred by Section 7 of the Sherman Act "in tort for treble damages."

Attention was called to the decision in the case at bar and to other authorities holding that such an action cannot be maintained at all in equity, and it was held that a stockholder cannot maintain an action *at law* in the name of a corporation to recover money damages under the act on the refusal of the corporation to bring the action.

> *United Copper Securities Co. vs. Amalgamated Copper Co.*, 223 Fed. 421.

It would seem that these authorities clearly establish our contention that a purely statutory legal right and remedy sounding in tort cannot be enforced in a federal court of equity.

Counsel for appellant contend, however, that there is jurisdiction in equity based upon the general principles underlying stockholders' suits and they cite as authority cases holding that a *cestui que trust* may, after demand upon the trustee to sue and the latter's refusal, bring the suit himself joining the trustee as co-defendant; that equity regards the relationship between a corporation and its own stockholders, or between the majority stockholders and the minority, as that of trustee and beneficiary, and that, accordingly, if the corporation (or trustee) fails to enforce a right existing in its own favor, equity, to prevent a fraud upon the minority stockholders, permits the latter to maintain a suit based upon the corporation's cause of action.

It is apparent, however, from the construction of the statute and the decisions of the Federal Courts that the

general rule applicable to stockholders' representative actions to secure redress to the corporation, is not applicable in this case. Jurisdiction is not sought under the general equity principles of the common law. The bill of complaint is not framed for equitable relief, nor is any equitable relief demanded.

One who is entitled to sue in the Federal Circuit Court may invoke its jurisdiction in equity only when the established principles and rules of equity permit such a suit in that court.

The only averment in the bill of complaint in this action appropriate to a stockholders' suit in equity is that contained in paragraph XXII (fol. 15), that prior to the commencement of the action plaintiff duly demanded of The Consolidated Street Lighting Company and its officers, to institute proceedings and seek relief similar to that sought herein, but such corporation and officers have refused and neglected to take such action or to institute proceedings; and that if the corporation and its officers did commence action the same would not be prosecuted with diligence and with good faith, as the corporation and its officers are controlled and directed by the other defendants in the action.

This averment is an attempt to comply with Rule 27 (formerly Rule 94) of the Equity Rules of Practice, which is a condition precedent to the right of a stockholder to maintain an action in behalf of his corporation.

Compliance with this rule, setting up the right of a stockholder to sue, does not alone give jurisdiction in equity. It goes simply to the plaintiff's legal status to maintain the bill.

Illinois Central Railroad Co. vs. Adams, 180 U. S. 28, 34-35;

Hawes vs. Oakland, 104 U. S. 450-460.

There can be equity jurisdiction only when the case in question belongs to one of the recognized classes of cases over which equity has jurisdiction.

In *Hawes vs. Oakland* (104 U. S. 450-460), it was held that,

> "to enable a stockholder in a corporation to sustain in a court of equity in his own name, a suit founded on a right of action existing in the corporation itself, and in which the corporation itself is the appropriate plaintiff, there must exist as the foundation of the suit—
>
> Some action or threatened action of the managing board of directors or trustees of the corporation which is beyond the authority conferred on them by their charter or other source of organization;
>
> Or such a fraudulent transaction completed or contemplated by the acting managers, in connection with some other party, or among themselves, or with other shareholders as will result in serious injury to the corporation, or to interests of the other shareholders;
>
> Or where the board of directors, or a majority of them, are acting for their own interest, in a manner destructive of the corporation itself, or of the rights of the other shareholders;
>
> Or where the majority of shareholders themselves are oppressively and illegally pursuing a course in the name of the corporation, which is in violation of the rights of the other shareholders, and which can only be restrained by the aid of a court of equity.
>
> Possibly other cases may arise in which, to prevent irremediable injury, or a total failure of justice, the court would be justified in exercising its powers, but the foregoing may be regarded as an outline of the principles which govern this class of cases.
>
> But, in addition to the existence of grievances which call for this kind of relief, it is equally important that before the shareholder is permitted in his own name to institute and conduct a litigation which usually belongs to the corporation, he should show to the sat-

isfaction of the court that he has exhausted all the means within his reach to obtain, within the corporation itself, the redress of his grievances, or action in conformity to his wishes."

See

Dodge vs. Woolsey, 59 U. S. 331, 341;
Dowell vs. Mitchell, 105 U. S. 430-432;
Buzard vs. Houston, 119 U. S. 347-352;
Whitehead vs. Shattuck, 138 U. S. 147-151;
Scott vs. Neely, 140 U. S. 106-113;
Curriden vs. Middleton, 232 U. S. 633, 636.

It is established by these authorities that courts of equity will not entertain jurisdiction of bills where damages or compensation in money, which are purely legal remedies, are sought, except when the damages are incident to equitable relief; and where damages are sought as incident to equitable relief and there is no ground for the equitable relief demanded, the bill will be dismissed. Where there are no liens or no trust is involved, or the equitable features are not apparent, federal courts decline jurisdiction.

The distinction between actions at law and suits in equity is carefully preserved in the federal courts, and it is held that this distinction is not a mere matter of form but inheres in the nature of judicial proceedings and is not affected by the statutes of the several states nor by the federal act of conformity.

Scott vs. Armstrong, 146 U. S. 499, 512.
Lindsay vs. Shreveport Bank, 156 U. S. 485, 493.
Gray vs. Grand Trunk W. Ry. Co., 156 Fed. 736, 741.

The only decision cited by appellant in the brief, the opinion in which seems to support the contention of coun-

sel, is *Aetna Insurance Co. vs. Albany & Susquehanna R. R. Co.* (156 Fed. 132); affirmed on opinion below (170 Fed. 1019), appeal denied 215 U. S. 601.

It is asserted in the brief (p. 9) that that was a suit in equity to require the defendant Delaware & Hudson Company to pay rent moneys to the defendant Albany & Susquehanna Co.

While the averments of the bill of complaint are discussed in the opinion, the nature of the action and the relief demanded does not clearly appear. An examination of the record discloses that the action was for equitable relief to which the payment of the money rent was an incident; that to ascertain the amount due required an accounting in equity and that such was the principle relief demanded.

After trial an interlocutory decree was made and entered in which it was, among other things, adjudged and decreed that the defendant Delaware Company was indebted to the defendant Albany & Susquehanna Company for several items of unpaid rent and that the Susquehanna Company was entitled to recover and receive the amount of such rent and the case was referred to the special master to take an accounting and compute the amount of such indebtedness, and on the coming in of the master's report a final decree was made confirming the same.

It appears, therefore, that the court did not in that case exercise its equity powers in an action for money damages only.

II.

The third and fourth assignments of error are frivolous.

The third specification in the assignment of errors (fol. 50) is that the courts below erred in holding that an ac-

tion will not lie to secure a judgment decreeing that the defendant corporation shall institute an action at law against the defendants (other than the corporation) to recover damages under the Anti-Trust Act.

The fourth specification (fol. 51) is that the courts erred in holding that the bill of complaint does not warrant such a construction as would permit the court to decree that the corporation shall sue the defendants (other than the corporation) for compensatory or treble damages under the statute.

These specifications are not urged or argued in appellant's brief, but they are specifically referred to in the brief (p. 5).

No question was decided nor considered in the District Court (fols. 21-25; 27), nor were either of such alleged errors specified in the assignment of errors on the appeal to the Circuit Court of Appeals (fols. 31-32), or mentioned in appellant's brief.

The Circuit Court of Appeals did not find and decide that an action will not lie to compel a corporation to institute an action at law provided by the Anti-Trust Act, although it might well have done so if the question had been presented.

So far as we have been able to find, it has never been decided that courts have power at the instance of stockholders to compel directors to institute suit to which the latter are opposed. The question was mooted but not decided in *Delaware & Hudson Co. vs. Albany & Susquehanna R. Co.*, 213 Fed., 435.

The Circuit Court of Appeals did find and decide (fol. 42) that, "There is no prayer for relief which would warrant such a construction of the bill as would merely require the Consolidated Company to sue the other defendants for treble damages under the statute."

An examination of the averments of the bill shows that no possible construction would warrant any such relief, whether prayed for or not. The bill is so definitely and clearly framed for relief against the defendants other than the Consolidated Street Lighting Company, and in money damages, that any discussion seems futile.

There is not an intimation in allegations of facts constituting the cause of action or by other averment, that any relief is sought against the Consolidated Company. On the contrary, every averment characterizes the suit as a stockholders' derivative action. An attempt to allege and enforce a cause of action in favor of the corporation, not against it.

The only relief demanded, or which the averments warrant, whatever the demand, is in favor of the corporation.

It is apparent that the bill would be bad if the suit were for such relief; for misjoinder of causes of action and misjoinder of parties.

III.

The decrees of the Circuit Court of Appeals should be affirmed with costs.

Dated, New York, December 2, 1915.

Respectfully submitted,

WILLIAM F. SHEEHAN,
Counsel for Defendants-Appellees.

EDWARD W. HATCH,
of the New York Bar,
on the Brief.